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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

AMERNATIONAL INDUSTRIES, INC.,
Petitioner,

v.

ELECTROEXPORTIMPORT
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDICES –

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May 14, 1991

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE STANDARD FOR RELIEF, UNDER RULE 60(b) FOR SETTING ASIDE A DEFAULT JUDGMENT IMPOSED AS A DISCOVERY SANCTION UNDER RULE 37, IS THE SAME AS THE STANDARD FOR SETTING ASIDE A DEFAULT JUDGMENT ENTERED FOR NON-ANSWER OR NON-APPEARANCE.

II.

WHETHER THE UNDERLYING MERITS MAY BE REVIEWED ON A RULE 60(b) MOTION TO SET ASIDE A DEFAULT JUDGMENT, WHERE THERE IS NO APPEAL FROM THE ENTRY OF THE DEFAULT JUDGMENT.

LIST OF ALL PARTIES

Plaintiff: Amernational Industries, Inc.
Defendants: Action Tungsram, Inc. and Electroexportimport

LIST OF PARENT COMPANIES AND/OR NONWHOLLY-OWNED SUBSIDIARIES

Neither Petitioner, Amernational Industries, Inc., nor Respondent, Electroexportimport, have any parent companies or nonwholly-owned subsidiaries.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 925 F.2d 970 (6th Cir. 1991). The opinion of the district court is unreported. Orders of the district court and Court of Appeals in this case appear in Appendices C through N.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals (App. B) was entered March 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 37(b)(2) and Rule 60(b) of the Federal Rules of Civil Procedure are set out in Appendices O and P.

STATEMENT OF THE CASE

1. Introduction

This case arose over a commercial dispute involving the sale and export of incandescent light bulbs manufactured by Defendant Electroexportimport (Electro), an instrumentality of the Romanian government, and Plaintiff Amernational, Inc., (Amernational) an American importer and distributor.

On December 12, 1986, Amernational served a request for production of documents upon Electro. Thirty-two months later, on August 2, 1989, Electro had yet to comply fully with the discovery request and the district court granted Plaintiff's motion for entry of a default judgment as a discovery sanction.

This was Plaintiff's third motion for imposition of a default judgment against Electro. The first arose out of Electro's failure to file an appearance and failure to appear at two pre-trial conferences. This first motion was denied; however, monetary sanctions were imposed. The second motion was for failure to respond to discovery requests and failure to pay the sanctions previously ordered by the court. The district court held this second motion for default judgment under advisement pending prompt compliance with the overdue document requests, as Electro tendered payment for the sanctions on the date of hearing on the motion. Notwithstanding this warning by the court, Amernational had to renew its motion for default judgment for noncompliance with discovery requests. The district court decided to enter a default judgment against Electro on August 2, 1989. Judgment was formally entered by the court on August 29, 1989.

The time for appeal of the default judgment expired on September 28, 1989. On November 6, 1989, Electro filed a motion to set aside the judgment and to stay execution. At

the December 21, 1989 hearing on this motion, almost thirty-six months after the original request for production of documents had been made, the district court denied Defendant's motion to set aside the judgment.

On February 15, 1991, the Court of Appeals for the Sixth Circuit reversed the denial of the motion to set aside the judgment, citing abuse of discretion. On March 13, 1991, judgment was issued as mandate of the Court.

2. Basis For Federal Jurisdiction In The First Instance

The original complaint asserted federal question jurisdiction under the provisions of 15 U.S.C. §§ 15 and 26, commonly known, respectively, as §§ 4 and 16 of the Clayton Act. Federal question jurisdiction was also asserted under 28 U.S.C. § 1337. The cause of action arose under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

3. History Of The Case: Basis For Default Judgment

Amernational originally brought this action against Action Tungsram, Inc. (Action), on January 22, 1986 (R1; J.App. p. 12)[1] on theories of tortious interference with contract and antitrust violations. Electro was added as a Defendant in an amended complaint filed August 20, 1986 (R25; J.App. p. 35) on theories of breach of contract and antitrust violations. Action was later dismissed from the case on June 25, 1987 after settlement. App. C, p. C-1.

On October 10, 1986, the district court clerk filed a statement that a copy of the amended complaint had been mailed to Electro in Romania, in conformity with the requirements for service of process under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601 *et seq*. The

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[1] "R" references are to the district court record entry numbers and "J.App." references are to pages of the Joint Appendix used in the Court of Appeals.

Economic Minister attached to the Embassy of the Socialist Republic of Romania in New York was also served with a summons, a copy of the amended complaint and Romanian translations on October 22, 1986. Later, on December 12, 1986, a request for production of documents was served on the Economic Minister. On January 13, 1987, Electro filed a paper described as "correspondence" by the docket clerk. (R35; J.App. p. 67). This document was later construed as an answer by the district court. (R55; J.App p. 192).

4. Plaintiff's First Motion For Default Judgment: Nonappearance

In March, April, and June 1987, Electro failed to appear at scheduled pretrial status conferences. The nonappearance in March, however, was due to the failure of the district court to notify Electro. On June 29, 1987, Amernational filed a motion for imposition of sanctions and a default judgment against Electro for failure to obtain local counsel, failure to file an appearance, and failure to appear at the last two pretrial conferences. (R40; J.App. p. 71). Amernational's president and counsel submitted affidavits setting forth damages claimed based on alleged anti-trust violations by Electro, and associated attorneys' fees. A proposed default judgment incorporating these damage amounts, trebled as provided by the Anti-Trust laws, including attorneys' fees, exceeded eleven million dollars. This amount was less than the amount prayed for in Plaintiff's amended complaint. A copy of this motion was served on Electro. Electro, however, failed to respond.

On July 28, 1987, Judge Hackett ordered Defendant to show cause why default judgment should not be entered at a hearing scheduled for August 26, 1987. App. D, p. D-1. On August 12, 1987, the hearing was adjourned until September 16, 1987 on Electro's representations that settle-

ment negotiations had begun. A further request for adjournment by Electro was denied. At this stage in the litigation, Electro finally appointed local counsel in Detroit to represent its interests. Notice of appearance was filed on September 17, 1987. (R50; J.App. p. 149). Defendant filed a cross motion for dismissal (R46; J.App. p. 111) and brief in support (R45; J.App. p. 95) on September 15, 1987.

Oral argument was heard by the district court on September 17, 1987. On December 17, 1987, the district court held that service of process complied with the requirements of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(b)(3)(B). App. E, p. E-4. The district court then dismissed one count of Amernational's complaint as relating to dismissed Defendant Action, and dismissed two counts as covered by the arbitration clause in the contract. App. E, p. E-4. Finally, the district court denied Plaintiff's motion for default judgment for failure to appear and failure to obtain local counsel as being unwarranted at that time. The district court did find, however, that Electro's actions were "purposeful attempts to delay this matter" and granted Amernational's motion for costs as sanctions. App. E, p. E-5.

On May 24, 1988, after Electro made an unsuccessful appeal to dismiss the remaining counts against it (App. F, p. F-1), the district court entered a scheduling order setting a closing date for all discovery on December 31, 1988, and a trial date of April 3, 1989. App. G, p. G-1. On November 7, 1988, the district court entered an order establishing the amount of the sanctions against Electro, awarding $2,300 to Plaintiff. App. H, p. H-1.

5. Plaintiff's Second Motion For Default Judgment: Discovery requests

On March 17, 1989, Amernational filed a motion for entry of a default judgment against Defendant Electro for

failing to respond to Plaintiff's request for production of documents, and for failing to pay the sanctions previously ordered by the district court. Electro paid the court-ordered sanctions to Plaintiff at the final pre-trial conference held on March 24, 1989, but failed to provide any response to the outstanding discovery requests. At the conference, the court ordered that a final pre-trial order be submitted by May 1, 1989, and that the case be set for trial at 9:00 on May 23, 1989. In addition, the district court took Amernational's motion for default judgment under advisement, warning Electro's counsel that prompt compliance with the document request was expected. App. I, p. I-2.

6. Plaintiff's Third Motion For Default Judgment: Discovery Requests

On June 8, 1989 (R85; J.App. p. 288) Amernational again moved for entry of a default judgment against Defendant under F.R.Civ.P. 37(b), based on Electro's failure to produce any requested documents. Electro's response (R86; J.App. p. 299) admitted that Electro "has yet to produce the requested documents," but stated that "said documents should be available for production shortly" and "efforts were still underway to obtain the documents, and that the documents would be produced as soon as available." (R86; J.App. p. 300).

7. Discovery Sanction: Entry Of Default Judgment

On August 2, 1989, the district court held a hearing on its July 17, 1989 order (App. J, p. J-1) to Electro to show cause why a default judgment should not be entered. At this hearing, counsel for Amernational advised the court that Electro had partially complied with the request for production of documents by turning over 87 pages of documents, two days before the hearing (R92, pp. 4-5; J.App. pp. 317-318). Electro's counsel conceded that the production was partial. (R92, pp. 9-10; J.App. pp. 322-323).

Electro's counsel was unable to offer assurances to the court as to when, if ever, complete compliance with Plaintiff's request for production of documents could be expected. (R92, p. 11; J.App. p. 324). The court concluded the hearing by granting Plaintiff's motion for entry of a default judgment. App. K, p. K-10. However, the court expressly advised Electro that it would entertain a motion to set aside the judgment if Electro could persuade the court that it was appropriate to do so. App. K, p. K-10. The court then directed counsel for Amernational to prepare a proposed judgment and to submit it to Electro's counsel for approval. (R92, p. 6; J.App. p. 329).

Plaintiff prepared a proposed default judgment and submitted it to counsel for Electro. Several weeks passed without response by Electro's counsel. Plaintiff then forwarded the proposed default judgment to the court for consideration. Counsel for Electro then submitted its own proposed form of judgment to the court. During the period from the hearing on August 2, 1989 through the last week in August, Electro had not produced any additional documents, had not filed a response to the request, and had not moved for additional time to respond.

On August 29, 1989, the district court entered as the judgment of the court a modified version of Plaintiff's proposed default judgment awarding damages of $11,070,000 plus interest, attorney's fees and costs. App. L, p. L-1. Plaintiff received a copy of this default judgment in the mail from the court clerk in early September, 1989. For some reason, Defendant's counsel did not receive any notice of entry of default judgment until October 2, 1989 when Amernational's counsel telephoned Defendant's counsel concerning Plaintiff's motion to allow execution upon the judgment.

The time for appeal of the default judgment expired on September 28, 1989. On October 4, 1989, Amernational

filed its motion to allow execution on the judgment. (R91; J.App. p. 305). On Monday, October 30, 1989, the additional thirty day period, under Rule 4(a)(5) of the Federal Rules of Appellate Procedure, permitting motions to request additional time to file a claim for appeal, expired. On Monday, November 6, 1989, Electro filed its motion to set aside the judgment and stay execution pending appeal. (R93; J.App. p. 332). In November, 1989, months after the date of entry of default judgment, Defendant's counsel forwarded additional documents to Amernational's counsel.

8. Hearing On Motions To Execute On Judgment And Set Aside Judgment

On December 21, 1989, the district court held a hearing on Plaintiff's motion to execute on the judgment and Defendant's motion to set aside the judgment. It was on this date, and after the hearing, that Defendant for the first time filed a formal response to the request for production of documents. At this hearing, nearly thirty-six months after the initial request for production of documents, and four months after entry of default judgment, the district court heard, for the first time, Defendant's reasons for noncompliance with discovery requests. From the initial document request, up until the day of the hearing, Defendant's counsel never filed a motion for extension of time within which to comply with the production of documents ordered. Upon objection by Amernational's counsel that testimony relating to the merits of the defense was inappropriate given the explicit requirements of Federal Rule of Civil Procedure 60(b), the court decided to hear Defendant's reasons for noncompliance with the discovery requests, and not the merits of the defense. App. M, pp. M-1, M-3.

The court, after considering Defendant's arguments, found Defendant's reasons for non-compliance with the discovery requests not to be persuasive. App. M, p. M-2.

The court expressed concern that even if relief were granted the parties would be in the same situation in the future, and explained that the court was never previously advised as to the Defendant's time requirements necessary to achieve compliance with the discovery requests. App. M, p. M-2. The court then held that it found no mistake or inadvertence, two possible grounds for relief from judgment under Rule 60(b)(1). App. M, p. M-2. Finally, based on the above, the court denied Defendant's motion to set aside the default judgment and granted Amernational's motion for execution upon the judgment in an order dated December 29, 1989. App. N, p. N-1.

9. The Reversal Of The Denial Of The Motion To Set Aside Default Judgment

In order to conclude, as it did, that the district court had abused its discretion in denying Defendant's motion to set aside the default judgment imposed for discovery sanctions, the Sixth Circuit used a three-step analysis:

1) Substitute its findings for the district court's findings: The Court of Appeals disregarded the district court's findings and substituted its own findings in reviewing the district court's ruling on Electro's Rule 60(b) motion. The Court of Appeals then made findings that relief was appropriate under Rule 60(b)(1) for "excusable neglect" and under Rule 60(b)(6) "for any other reason."

2) Find that the district court did not consider the cultural differences between the United States and Romania, and the policy of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(e) favoring trials on the merits for foreign sovereigns. (App. A, p. A-10).

In finding an abuse of discretion, the Sixth Circuit held that the district court did not consider cultural, govern-

mental, and political differences between the United States and Romania even though examples of such differences had been argued by Electro at the hearing to set aside the default judgment. (Transcript, J.App. pp. 484-485). The Sixth Circuit also found a lack of consideration of the FSIA policy favoring trial on the merits (App. A, p. A-10) by implying that the default judgment had been whimsically entered by the district court. The transcripts of the hearings on the motion to impose the default judgment as a discovery sanction and the motion to set aside the default judgment demonstrate that the district court felt that no other action on its part would be appropriate. (Transcript, J.App. pp. 328-329, 492-493).

3) Apply a three-part test appropriate to motions for relief from default judgment entered for non-appearance: 1) prejudice to the plaintiff, 2) meritorious defenses, and 3) culpability of the defendant's conduct.

a. *Prejudice*

The Sixth Circuit first attacked the district court's denial of Electro's Rule 60(b) motion by holding, contrary to the district court, that there would be no prejudice to plaintiff if relief were granted. App. A, p. A-12. The Sixth Circuit based its ruling on the fact that the district court did not explain how the Plaintiff would be prejudiced. App. A, p. A-12. The Court of Appeals further extracted from the record the mistaken notion that Plaintiff's discovery requests had been fully complied with, contrary to the record, and the undisputed statements of Plaintiff's counsel at the hearing. Despite the statement by the district court "I have no sense that if this judgment was set aside, we would not all be back in another year or two hearing the same reasons why this case couldn't proceed on this court's docket" (Testimony; J.App. p. 494), the Sixth Circuit summarily stated "we are unable to discern any prejudice that

cannot be overcome *by proper scheduling*." (emphasis added). App. A, p. A-12.

b. *Meritorious defense*

The second point of attack concentrated on the existence of a meritorious defense. The district court refused to consider the merits of the defense, because the default judgment had been entered as a discovery sanction, and the merits were irrelevant. Despite this, the Sixth Circuit held that the district court's failure to consider the defenses raised did not preclude it from considering them. App. A, p. A-13. The Court of Appeals gave the Defendant the benefit of the doubt with respect to defenses raised previously in the action. The Court even gave weight to the contract's arbitration clause in spite of the fact that it admitted that the district court had previously rejected this argument and that that particular ruling was not squarely before the Sixth Circuit. App. A, pp. A-13 – A-14.

c. *Culpability*

The third issue raised by the Sixth Circuit involved the culpability of the Defendant. The Court placed weight on the fact that Defendant's *counsel* probably did not have actual notice of discovery violations until March, 1989. App. A, p. A-15. The Court of Appeals disregarded the fact that the original discovery request was served on Defendant at a time when it was not represented by counsel; the fact that Defendant's counsel did not even enter an appearance in the action until another nine months later, and that it was Defendant counsel's responsibility to obtain its client's transaction file or review the court's file and inform itself of the status of the case when it began its representation. The Court of Appeals highlighted the fact that since Plaintiff's discovery requests were not continuously pressed for the entire thirty-six month period that they were outstanding, including time diverted to an attempted appeal, that

Defendant's conduct was that much less culpable. App. A, p. A-15. In spite of the district court's finding that defendant's explanations were not persuasive, calling them "too little too late," the Sixth Circuit gave great weight to Electro's explanations given for its delays. App. A, p. A-15. The Court of Appeals stated that "Electro's failure to respond, although not commendable, falls short of showing a reckless disregard for the effect of its conduct." App. A, p. A-15. This directly conflicts with the district court's finding that:

> [i]f the parties were just proceeding as they thought they might and as their circumstances allowed, the rules are clear, there are ways to keep the court advised to get the time necessary to do what's required of them. But from the anything [sic] I have before me, the Defendants were not doing so. They have attorneys that definitely were in contact with them. If they weren't following their counsel's advice, they did so at their peril.

(Transcript; J.App. p. 494)

d. *Size of the damage award*

As an endnote, the Sixth Circuit justified its reversal of the district court by placing great weight on the size of the damage award and implying that the district court did not fully take this fact into account. App. A, p. A-15. To the contrary, the district court, in denying Electro's motion for relief from judgment stated, "I recognize it's a substantial amount of money. It is not a judgment that this court entered lightly." (Transcript; J.App. p. 493). The Court of Appeals also attacked the basis on which the damages were awarded, namely an affidavit containing an estimate of damages provided by Plaintiff's president. App. A, p. A-15. The Court of Appeals' ruling implied that the district court took this whole matter lightly and did not fully take

these factors into account when issuing its ruling. The result of the analysis applied by the Court of Appeals is that the size of damage awards alone will exculpate a party that repeatedly disobeys discovery orders.

REASONS FOR ALLOWANCE OF THE WRIT

I.

IMPORTANCE TO THE FEDERAL COURT SYSTEM

This petition for certiorari presents the opportunity for the Court to provide judicial guidance in the application of Rule 60(b) relief as it applies to default judgments imposed as Rule 37(b) discovery sanctions. The ability of the district courts to supervise litigation and manage discovery is vital to the efficient functioning of the federal court system. If discovery sanctions imposed by the district courts are reviewed by the standards established by the Court of Appeals in the instant case, then the important policy to deter discovery abuse set forth by this Court in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) will be undermined. The discovery issues presented in this petition affect every case that is tried in the federal district courts.

The policy of employing Rule 37 sanctions to curb discovery abuse is set forth in two cases previously considered by this Court. In *National Hockey League*, a case involving a dismissal imposed as a Rule 37 discovery sanction, this Court held:

> [t]here is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order.
>
> * * *

> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in absence of such a deterrent.

427 U.S. at 643. Later in *ACF Industries, Inc., Carter Carburetor Division* v. *Equal Employment Opportunity Comm'n.*, 59 L.Ed.2d 52 (1979) (certiorari denied) (Powell, J., Stewart, J., Rehnquist, J., dissenting), a case involving Rule 37 sanctions for discovery abuse, Justice Powell expressed the following with respect to the need to curb the "widespread abuse of discovery":

> I have referred briefly to the concern that exists with respect to abuse of discovery to emphasize that, at least until rule changes can be made, there is a pressing need for judicial supervision in this area. The district court before which a case is being litigated is in a far better position than a court of appeals to supervise and control discovery and to impose sanctions for its abuse. . . . It is a serious matter for a court of appeals to undercut a district court's authority on questions of this kind, which are peculiarly within its discretion and competency.

59 L.Ed.2d at 55.

Rule 55(c) provides that judgment by default may be set aside in accordance with the provisions of rule 60(b). Rule 60(b) provides for relief from all types of final judgments; by default or otherwise. It clearly labels six grounds for relief. The decision to grant or deny such relief is discretionary with the court.

Beyond meeting the basic prerequisites for review of a judgment under one of the six categories in Rule 60(b), the application of relief is left to the discretion of the district court. Accordingly, Rule 60(b) decisions are reviewable under an abuse of discretion standard. Wright & Miller, *Federal Practice and Procedure:* Civil § 2857. In their review for abuses of discretion, the various circuits have applied different sets of criteria. It is this divergence in approaches to the review of Rule 60(b) motions that threatens to erode the holdings in *National Hockey League*.

II.

CONFUSION IN THE CIRCUITS IN REVIEWING MOTIONS TO SET ASIDE DEFAULT JUDGMENTS IMPOSED AS DISCOVERY SANCTIONS

This case presents for the Court the opportunity to define separate standards and considerations for reviewing Rule 60(b) motions to set aside default judgments imposed as Rule 37(b) discovery sanctions as opposed to default judgments imposed for non-appearance or failure to answer.

In evaluating whether or not a district court has abused its discretion in ruling on a 60(b) motion to set aside a default judgment entered as a Rule 37(b) sanction, the circuits have not applied clear-cut, uniform criteria. No differentiation has been made with respect to considerations for evaluating abuse of discretion in setting aside default judgments imposed as sanctions versus judgments entered through the failure of a defendant to appear and defend the action.

Many circuits have applied equitable tests in exercising their discretion under Rule 60(b). Wright & Miller, *Federal Practice and Procedure:* Civil § 2857. A number of cases hold that discretion should lean towards granting rather than denying relief, while other cases urge caution in

granting relief from judgment, and that judgment should be set aside only in exceptional circumstances. *Id.* Finally, courts consider the policy of the law favoring a trial on the merits versus a desire to achieve finality. *Id.*

In the present case, no appeal was taken from the underlying default judgment. The Sixth Circuit, in reviewing the district court's denial of the motion for relief from the default judgment sanction, relied upon its own findings in applying a three-part test for abuse of discretion. This test involved looking at 1) whether the Plaintiff will be prejudiced by granting relief, 2) whether the Defendant has a meritorious defense, and 3) the culpability of the Defendant in causing the default judgment. It is important to note, however, that this test was borrowed from the Sixth Circuit's holding in *United Coin Meter Co. v. Seaboard Coastal Line R.R.*, 705 F.2d 839 (6th Cir. 1983), a case involving Rule 60(b) relief from default judgment imposed for failure to file an answer to the complaint, which the Sixth Circuit in turn borrowed from the Third Circuit in *Farnese v. Bagnasco*, 687 F.2d 761 (3d Cir. 1982), a case likewise involving relief from default judgment imposed for failure to file a timely answer.

After completing its analysis of its test, the Sixth Circuit concluded that "excusable neglect," under Rule 60(b)(1), or "other reason[s] justifying relief," under Rule 60(b)(6), constituted grounds for relief under rule 60(b). The Court of Appeals added that the size of the award weighed in favor of a trial on the merits.

The federal courts of appeal have developed diverse approaches in reviewing abuse of discretion on Rule 60(b) motions for relief from default judgment/dismissal imposed as discovery sanctions. In addition to the present case, other circuits applying a multi-part test including a review of the merits of the defaulting party's defense include *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863, 868

(3d Cir. 1984) (utilizing a six-part test), and *U.S. v. DiMucci*, 879 F.2d 1488, 1495 (7th Cir. 1989) (utilizing a three-part test). Cases looking mainly toward whether any of the six grounds for relief under Rule 60(b) have been established as a basic requirement for relief include *Kotlicky v. United States Fidelity & Guar. Co.*, 817 F.2d 6, 8-9 (2nd Cir. 1987) (reviewing defaulting party's excuses to determine if excusable neglect existed under Rule 60(b)(1)), *Sec. and Exch. Comm'n. v. Seaboard Corp.*, 666 F.2d 414, 415-416 (9th Cir. 1982) (merits of the default judgment are not sufficient grounds for granting a Rule 60(b)(1) motion; before issue of defenses can be reached, mistake, surprise, inadvertence, or excusable neglect must be shown), *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1275 (9th Cir. 1985) (Wallace, J., concurring) (Rule 60(b) motion must satisfy the minimum criteria of that rule, i.e. state a recognizable reason for relief, before the district court may evaluate the merits of the motion), and *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1387 (9th Cir. 1988) (no abuse of discretion because no valid reason or adequate showing of excusable neglect given).

The Seventh Circuit has most closely mirrored the deterrence policy of *National Hockey League*. The Seventh Circuit has refused to grant Rule 60(b) relief where the default was in the "meaningful control of the defaulting party or its attorney." In *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1206 (7th Cir. 1984), the court stated Rule 60(b) relief is appropriate "only in the exceptional circumstance where the events contributing to the default judgment have not been within the meaningful control of the defaulting party, or its attorney." The court went on to explain its policy on Rule 60(b) motions for relief from default judgments as follows:

> Although a default judgment is a harsh sanction and the law does favor trials on the merits, these

> considerations must be balanced against the need to promote efficient litigation and to protect the interests of all litigants. Accordingly, the decisions of this circuit reflect the notion that the district court must have the default judgment readily available within its arsenal of sanctions 'in order to ensure that litigants who are vigorously pursuing their cases are not hindered by those who are not.' In order for the default judgment to be an effective deterrent against irresponsible conduct in litigation, relief from a default judgment under rule 60(b) must be perceived as an exceptional remedy.

726 F.2d at 1206 (quoting *Stevens* v. *Greyhound Lines, Inc.*, 710 F.2d 1224, 1230 (7th Cir. 1983)).

III.

SUMMARY OF POLICY AND EFFECT OF RULE 60(B) MOTIONS AND DEFAULT JUDGMENTS IMPOSED AS DISCOVERY SANCTIONS.

In light of these considerations, Petitioner submits that it is necessary for this Court to review the questions of whether there should be a different standard for relief from default judgments imposed as discovery sanctions than for default judgment imposed for non-appearance, and whether it is appropriate for the reviewing court to consider the merits of the defendant's case when a default judgment has been imposed as a discovery sanction.

To achieve the desired policy effect of deterrence, default judgments imposed as discovery sanctions should be given great deference by reviewing courts and relief granted only in exceptional circumstances. The scope of review should be much more narrow than a review of a motion to set aside a default judgment imposed in a non-sanction situation such as for non-appearance or failure to file an answer.

Additionally, basic grounds for relief specified in Rule 60(b) should be satisfied *before* a court of appeals should consider any additional factors. *See Sec. and Exch. Comm'n. v. Seaboard Corp.*, 666 F.2d 415, 416 (9th Cir 1982); *United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1275 (9th Cir 1985) (Wallace, J., concurring). With respect to Rule 60(b) motions and default judgments and dismissals imposed as sanctions, the court in *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986) stated, "[t]he decision under Rule 60(b) is discretion piled on discretion, and as we said in *Metlyn* such doubly discretionary decisions stand unless the judge was very far off base — if the judge relied on forbidden factors or omitted to consider some important relevant factor."

In a sanction situation, the merits of a defendant's case should not be a factor involved in an appellate review for abuse of discretion in a Rule 60(b) motion. A default judgment entered as a discovery sanction is not entered based on the merits of the dispute, but is entered *as a sanction* — without regard to the merits. While the district court may grant relief under Rule 60(b), the rule cannot be used as a substitute for appeal. *7 Moore's Federal Practice* 60.30(1), pp. 60-130. An appeal from an order denying relief under Rule 60(b) does not bring up the judgment for review. *Godwin v. Fed. Sav. & Loan Ins. Corp.*, 806 F.2d 1290 (5th Cir. 1987); *Paige v. Schweiker*, 786 F.2d 150 (3d Cir. 1986).

The procedure for imposing default judgments as sanctions under Rule 37(b) is very clear: a motion for an order compelling discovery, issuance of the order, failure to obey the order, imposition of default judgment as a sanction. Nowhere are the merits of a defendant's case a consideration to be contended with in the rule. Likewise, a motion to set aside such a judgment is not concerned with the merits of the claims and defenses, but only with the discretion involved in considering the conduct which caused the

sanction to be imposed in the first place. If the merits were to be considered in a sanction situation, then a clear message would be sent that recalcitrant parties sanctioned for abuses in the discovery process can get off the hook just because they have a good case. If discovery is to be considered a serious matter, this cannot be.

Finally, the District of Columbia Circuit, in *Dellums* v. *Powell*, 566 F.2d 213, 235 (D.C. Cir. 1977), in discussing the importance of discovery sanctions and this Court's holding in *National Hockey League*, stated:

> [i]f parties are allowed to flout their obligations, choosing to wait to make a response until a trial court has lost patience with them, the effect will be to embroil trial judges in day-to-day supervision of discovery, a result directly contrary to the scheme of the federal discovery rules.

The Court of Appeals in the instant case failed to recognize the obvious validity of these propositions. On the contrary, it ridiculed Petitioner's suggestions that a distinct standard of review should be applied for default judgments imposed as discovery sanctions and that review of the merits of defendant's case is inappropriate in a sanction situation. The message that the Court of Appeals is sending is clear, but wrong: district courts may be freely second guessed by the courts of appeals in attempting to control discovery, and defendants with meritorious defenses or large exposure to damage claims need not bother to comply with discovery orders.

This Court must review this case to preserve the control of the district courts over the discovery process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, in the alternative, summary reversal of the decision of the Court of Appeals should be ordered.

Respectfully submitted,

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APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

OPINION OF THE COURT

(United States Court of Appeals — Sixth Circuit)

(Argued January 29, 1991)
(Filed February 14, 1991)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff-Appellee, v. ACTION-TUNGSRAM, INC., Defendant; ELECTROEXPORT-IMPORT, Defendant-Appellant — No. 90-1050; On Appeal from the United States District Court for the Eastern District of Michigan)

Before: KEITH and MILBURN, Circuit Judges;
and CONTIE, Senior Circuit Judge.

MILBURN, Circuit Judge.

Defendant-appellant Electroexportimport ("Electro") appeals from an order denying its motion to set aside a default judgment of approximately $11 million entered in favor of plaintiff-appellee Amernational Industries, Inc., ("Amernational") as a sanction for failure to comply with Amernational's discovery request for production of documents. Because we are firmly convinced that the district court abused its discretion, we reverse.

I.

A.

This case arises out of the sale of household light bulbs by a Romanian trading company for importation into the United States by two United States based corporations, one

being the plaintiff and the other a competitor of the plaintiff. At the center of this dispute is a contract executed on March 21, 1983, between Electro, the wholly owned trading company and instrumentality of the government of Romania, and the plaintiff for the sale of approximately $1,000,000 worth of incandescent bulbs.

B.

Because of the nature of this case, we find it necessary to provide a fairly detailed account of its procedural progress. The original complaint filed January 22, 1986, named Action-Tungsram, Inc. ("Tungsram") on theories of interference with contract and antitrust violations; however, the complaint against Tungsram was dismissed on June 19, 1987. An amended complaint adding Electro on theories of breach of contract and antitrust violations was filed on August 20, 1986. Initially, the summons and complaint were served on a Romanian diplomat with no affiliation to Electro; however, on December 30, 1986, proof was posted in Romania that Electro received a copy of the complaint that was mailed by the district court clerk on October 10, 1986. In the meantime, on December 12, 1986, plaintiff filed a request for production of documents by Electro[1] and served that request, like the complaint, on the Romanian diplomat.

In March, April and June, 1987, Electro failed to appear at status conferences scheduled by the district court. On the first occasion, Electro had a valid excuse because the court failed to notify Electro of the conference. The failure to appear in April and June led to a motion by the plaintiff for imposition of sanctions and default judgment.

In opposing the motion, Electro argued that default judgment could not be entered against it as an instrumen-

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[1] In "shotgun" form, the document request sought an extensive list of "all documents," etc., "relating to dealings" between Amernational, Tungsram and any Romanian entity. *See* J.A. 62.

tality of a foreign sovereign. *See* 28 U.S.C. § 1608(e). In a cross-motion, Electro sought dismissal of the action on the grounds that Amernational had not complied with certain provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, and that the dispute should be submitted to arbitration pursuant to an arbitration clause in the contract between Electro and Amernational.

Based upon the proof of service posted December 30, 1986, the district court found that the Foreign Sovereign Immunities Act had been complied with. The court then dismissed three of the seven counts in the complaint as covered by the arbitration clause, and held that the arbitration clause did not apply to the alleged antitrust violations as they were not matters arising "in connection with the present contract." The court also denied default judgment but granted the motion as to sanctions leaving the amount to be determined later.

Following an unsuccessful attempt by Electro to appeal from the order denying the motion to dismiss the remaining counts of the complaint,[2] the district court entered a scheduling order on May 24, 1988, calling for the completion of discovery by December 31, 1988. On November 7, 1988, the court entered an order awarding sanctions against Electro in the amount of $2300.

On March 17, 1989, Amernational filed a second motion for entry of default judgment based on non-payment of the $2300 in sanctions and Electro's failure to respond to the request for production of documents allegedly served on Electro on December 11, 1986. We note that Amernational's brief in support of the motion concentrated on

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[2] The appeal was dismissed on the ground that the denial of the motion to dismiss was not a final judgment. *Electroexportimport* v. *Amernational Indus.*, 845 F.2d 325 (6th Cir. 1988) (unpublished order). The law has subsequently changed to allow such an appeal where denial of arbitration is involved. *See* 9 U.S.C. § 15(a).

the failure to pay sanctions as ordered and made no mention of a discovery violation. Electro responded that this was the first notice to its counsel of any outstanding request for production of documents and tendered a check to Amernational's counsel in full payment of the awarded sanctions. At a March 24, 1989, conference, the district court took the motion for default judgment under advisement with respect to the outstanding discovery request.

On June 8, 1989, Amernational renewed its motion for default judgment based on the failure to produce the requested documents. In response to the motion, Electro's local counsel indicated that, per telex communication from Romania, Electro was undertaking to comply with the document request. Pursuant to a show cause order, the court held a hearing on August 2, 1989, as to whether default judgment should be granted. At the time of the hearing, Electro had partially complied with the production request by turning over eighty-seven pages of documents to Amernational's counsel two days before the hearing. Amernational contended that the documents produced were far short of those needed to prosecute the case, and did not constitute a response as envisioned by Federal Rule of Civil Procedure 34.

At the hearing, Electro's counsel complained that the initial discovery request was made, without translation, before effective service of process on Electro.[3] Electro's counsel also assured the court that he had made diligent efforts to secure the documents and believed that he had impressed upon the client the necessity of producing the documents; however, he was unable to give the court assurance as to when discovery would be completed or any hope that the case would be resolved by settlement in the near future.

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[3] The Federal Rules of Civil Procedure provide for service of a document request upon a defendant only "after service of the summons and complaint." Fed.R.Civ.P. 34(b) (emphasis added).

The court granted plaintiff's motion for default judgment stating that "without taking very strong action at this time . . . this case will just be further delayed and your client will just assume that in the process of things it will go on indefinitely." J.A. 329. The court further explained:

> *I'll just state in closing that I will entertain a motion to set that aside if there are reasons why I should do so.* Possibly you can look to bringing the necessary persons together or parties in an attempt to resolve it. But short of that, plaintiff will have their [*sic*] judgment.

J.A. 329 (emphasis added).

The court instructed counsel for Amernational to prepare a proposed default judgment and submit it to Electro for consideration. When the parties disagreed as to the content of the proposed order, the district court drafted its own and entered judgment for plaintiff on August 29, 1989. However, for reasons which are not clear, Electro did not receive notice of entry of the judgment until October 2, 1989. At this time the thirty-day period for filing a notice of appeal had expired, and Electro failed to seek an extension of the appeals period.

The default judgment as entered awarded damages in the sum of $11,070,000 plus interest, attorney's fees and costs. The judgment did not explain the methodology by which the court arrived at the damage award; however, it appears to be the product of tripling plaintiff's lost profits of $3,690,000 as calculated by plaintiff's president, Casimir Rygiel. Rygiel submitted an affidavit in which he stated that Electro's breach of contract and associated antitrust violations caused plaintiff to lose $16,200,000 in sales, with resulting lost profits of $3,690,000. However, Rygiel recognized that the cost of sales component of his calculations was only an approximation.

On November 6, 1989, following plaintiff's motion for execution on the judgment, Electro filed a motion to set aside the judgment and to stay execution. On December 21, 1989, the district court held a hearing on the respective motions. In the meantime, Electro's local counsel had furnished what it claimed to be the balance of the requested documents under cover of letters dated July 31, 1989, November 4, 1989 and November 10, 1989. Electro's counsel served and filed a formal response to Amernational's production request on December 21, 1989, immediately after the hearing.

At the hearing, counsel for Electro asserted three reasons why the default judgment should be set aside under Federal Rule of Civil Procedure 60(b)(1)[4]. First, counsel argued that the default judgment should be set aside because of procedural irregularities in that the judgment was entered on the basis of non-compliance with a production request that was never served on counsel of record and, furthermore, was made even before Electro formally became a party to the litigation.

Second, counsel argued that there was justifiable excuse for the non-compliance. Testimony to this effect was tendered but was unnecessary because "[p]laintiff's counsel stipulated for purposes of the hearing to Defendant's recitation of the reasons why there had been a delay in the document production, agreeing that there had been a flood, that there had been a move and that Electro's records were in a disarray." Appellee's Brief at 10. To Amernational's assertion that there had been no prior mention of the difficulties encountered in producing the documents, Electro's counsel explained that because of difficulties in communi-

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[4] Electro also asserted that the court could grant relief from the judgment under Federal Rule of Civil Procedure 60(b)(6) which allows the court to give relief from a final judgment for "any other reason justifying relief from the operation of the judgment."

cating with Romania by telex, counsel had only recently become aware of the reasons for the delay. To illustrate the magnitude of the communication problem, counsel explained that in one day he made fifteen attempts to communicate with Romania only to have his telex communication interrupted or received in a garbled form.

Third, counsel for Electro argued that the default judgment should be set aside because of a high likelihood of success on the merits. Electro attempted to tender approximately twenty minutes of testimony by Mr. Ionescu, the manager of Electro who had been flown in from Romania; however, the district court refused to allow any testimony concerning the merits of the case.

Ionescu also was prepared to assure the court that its orders would be complied with in the future. This was consistent with counsel's representation to the court that the Romanians had attempted to comply with discovery demands to the extent that they understood and were able.

In denying Electro's motion to set aside the judgment and granting Amernational's motion for execution on the judgment, the district court stated:

> Months after the default judgment, I am hearing for the first time some of the reasons the discovery ordered by this court, production of documents [*sic*] was not provided, and, specifically what the parties were directed to do.
>
> It's too little to [*sic*] late and I don't find what I've heard today persuasive. I have no sense that if this judgment was [*sic*] set aside, we would not all be back in another year or two hearing the same reasons why this case couldn't proceed on this court's docket. Setting aside this judgment at this time would severally [*sic*] prejudice the plaintiff.

> I don't understand at this time why the defendants [*sic*] did what they [*sic*] did. And I believe the reasons stated on the record are just not sufficient to set aside the judgment based on what I have. The rules are clear. There was no mistake or inadvertence.
>
> If the parties were just proceeding as they thought they might and as their circumstances allowed, the rules are clear, there are ways to keep the court advised to get the time necessary to do what's required to be done.
>
> But from the anything [*sic*] I have before me, the defendants [*sic*] were not doing so. They [*sic*] have attorneys that definitely were in contact with them [*sic*]. If they [*sic*] weren't following their [*sic*] counsel's advice, they [*sic*] did so at their [*sic*] peril.

J.A. 494. On December 28, 1989, the district court entered an order denying relief, and this timely appeal followed.

The principal issue presented in this appeal is whether the district court abused its discretion in failing to grant Electro's motion under Federal Rule of Civil Procedure 60(b) for relief from the judgment entered as a sanction for discovery abuses.

II.

A.

[1] Federal Rule of Civil Procedure 60(b) allows a district court, upon a party's motion, to relieve that party from a final judgment upon a showing of "(1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) any other reason justifying relief from the operation of the judgment." A district court's ruling on a Rule 60(b) motion is directly appealable; however, "an appeal from denial of Rule 60(b) relief does not bring up the under-

lying judgment for review." *Peake v. First Nat'l Bank and Trust Co.*, 717 F.2d 1016, 1020 (6th Cir. 1983) (quoting *Browder v. Department of Corrections*, 434 U.S. 257, 264 n. 7, 98 S.Ct. 556, 560 n. 7, 54 L.Ed.2d 521 (1978)). "The decision to grant or deny . . . motions under Rule 60(b) is discretionary with the district court. Consequently, we review whether the district court abused its discretion. 'Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.'" *Davis v. Jellico Community Hosp. Inc.*, 912 F.2d 129, 132-33 (6th Cir. 1990) (citations omitted).

B.

[2] Electro places great emphasis on the fact that it is "the government-owned and controlled trading company of the Socialist Republic of Romania." Appellant's Brief at 20. In its brief, Electro essentially argues that relief should have been granted under Rule 60(b) because pursuant to 28 U.S.C. § 1608(e),[5] judgment cannot be entered against an instrumentality of a foreign state without a trial on the merits.

Without directly addressing Electro's argument, plaintiff asserts that default judgment may be entered against a party as a sanction for discovery abuses. *See Regional Refuse Systems v. Inland Reclamation Co.*, 842 F.2d 150 (6th Cir. 1988); see also *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482 (5th Cir. 1990) (upholding judgment for plaintiff despite lack of order to compel because of defendant's failure to properly respond to document

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[5] The statute provides:

> No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. . . .

28 U.S.C. § 1608(e).

request until five months after deadline for discovery had expired). By ignoring the identity of its opponent, plaintiff implies that if judgment is entered against a party as a sanction, then the identity of the party is irrelevant.

[3] We see some merit in each party's position; however, each party claims more g.ound that it can defend. Clearly, 28 U.S.C. § 1608(e) does not relieve foreign instrumentalities of the duty to defend cases or to obey court orders. See *Alameda v. Secretary of Health, Educ. & Welfare*, 662 F.2d 1044, 1047-48 (1st Cir. 1980) (identical wording in Federal Rule of Civil Procedure 55(e) pertaining to the United States does not prohibit entry of default against the United States and does not relieve the United States from the duty to defend cases and obey court orders). On the other hand, we will not ignore the strong policy stated in the statute, as part of the Foreign Sovereign Immunities Act, of encouraging foreign states and their instrumentalities to appear before United States courts and allowing the merits of cases involving foreign sovereigns to be considered completely and carefully. *See Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 175 (5th Cir. 1989) (affirming district court's grant of Rule 60(b) relief); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551-52 (D.C.Cir. 1987) (remanding for consideration of Rule 60(b) relief); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986) (affirming Rule 60(b) relief under subsection (6)), *cert. denied*, 480 U.S. 917, 107 S.Ct. 1371, 94 L.Ed.2d 687 (1987). Thus, rather than following the course suggested by either party, we hold that the policy expressed in the statute and the broad divergence of cultural, governmental, and political practices between the United States and Romania are factors which should have been considered by the district court in the exercise of its discretion. *See Hester*, 879 F.2d at 175; *Practical Concepts*, 811 F.2d at 1551; *Jackson*, 794 F.2d at 1496.

[4] We have recognized that "[j]udgment by default is a drastic step which should be resorted to only in the most extreme cases." *United Coin Meter v. Seaboard Coastline RR*, 705 F.2d 839, 845 (6th Cir. 1983). "In considering a motion to set aside entry of a judgment by default a district court must apply Rule 60(b) 'equitably and liberally . . . to achieve substantial justice.'" Id. at 844-45 (quoting *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980) (per curiam)). The decision on a Rule 60(b) motion to set aside entry of a judgment by default is controlled by three factors: "1. Whether the plaintiff will be prejudiced; 2. Whether the defendant has a meritorious defense; and 3. Whether culpable conduct of the defendant led to the default." *Id.* at 845 (quoting *Farnese v. Bagnasco*, 687 F.2d 761, 764 (3d Cir. 1982)); *see Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir. 1990) (per curiam).

Plaintiff argues that "[t]he trial court's decision whether or not to set aside a default judgment entered as a sanction is governed by different considerations than those applicable to a default judgment entered for a defendant's non-appearance." Appellee's Brief at 14. Not only does plaintiff fail to offer any authority to support its argument, but plaintiff also fails to explain how a belated response to a discovery request is a more egregious action than a belated pleading — a context in which we have specifically applied the three-factor analysis set forth in *United Coin*. *See INVST Fin. Group v. Chem-Nuclear Systems*, 815 F.2d 391, 398 (6th Cir.), *cert. denied*, 484 U.S. 927, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987). Moreover, other courts have granted relief under Rule 60(b) from judgment entered as a discovery sanction. *See Kotlicky v. United States Fidelity & Guar. Co.*, 817 F.2d 6, 9 (2d Cir. 1987) (balancing policy of finality against policy favoring determination on the merits); *United States Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979) (per curiam) (refusal to cooperate was due to confusion and ignorance); *see also United States*

v. *Shipco General, Inc.*, 814 F.2d 1011, 1013 (5th Cir. 1987) (refusing relief but applying factors similar to those in *United Coin*). Accordingly, we hold that the *United Coin* analysis applies to this case.

[5] Consequently, our first inquiry under *United Coin* concerns whether the plaintiff will be prejudiced if the judgment is vacated. In an oral ruling, the district court stated that setting aside the judgment would severely prejudice the plaintiff; however, the court failed to explain how the plaintiff would be prejudiced. In this connection, we note that the transcript of the hearing does not reveal that the plaintiff argued that it would be prejudiced.

Plaintiff did assert at the earlier hearing on its motion for default judgment that the delay in receiving discovery materials prejudiced its ability to prepare for trial. "However, 'delay alone is not a sufficient basis for establishing prejudice.' 'Rather, it must be shown that delay will result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.'" *INVST*, 815 F.2d at 398 (citations omitted) (quoting *Davis* v. *Musler*, 713 F.2d 907, 916 (2d Cir. 1983)). There are no assertions here of loss of evidence or collusion, and from the record it appears that as of the time of the hearing on the motion to vacate the judgment, Electro had complied with plaintiff's discovery request. Thus, we are unable to discern any prejudice to the plaintiff that cannot be overcome by proper scheduling.

[6] The second factor we consider is whether Electro set forth a meritorious defense. In evaluating the asserted defense, "[l]ikelihood of success is not the measure. . . . [r]ather, if *any* defense relied upon states a defense good at law, then a meritorious defense has been advanced." *INVST*, 815 F.2d at 389-99 (quoting *United Coin*, 705 F.2d at 845) (emphasis in original). The defense is sufficient if it contains "'even a hint of a suggestion'

which, proven at trial, would constitute a complete defense." *Id.* (quoting *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 372, 374 (D.C.Cir. 1980)). "The key consideration is 'to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.'" *Id.* (quoting 10 C.Wright, A. Miller, M. Kane, *Federal Practice and Procedure*, § 2697 at 531 (1983)). Moreover, we construe ambiguous or disputed facts in the light most favorable to the defendant. *INVST*, 815 F.2d at 398.

At the hearing on Electro's Rule 60(b) motion, the district court refused to hear any evidence going to Electro's defenses. In a similar vein, plaintiff argues in its brief to this court that the merits of the case are not to be considered in a Rule 60(b) motion. In fact, plaintiff asks this court to "impose sanctions on appeal, including costs and fees, for Defendant's frivolous attempt to raise issues on appeal which are barred." Appellee's Brief at 26. Since the defendant's change of presenting a meritorious defense is a factor that must be considered in granting or denying a Rule 60(b) motion, we find absolutely no merit in plaintiff's position that the merits cannot be considered, and we are surprised that this argument prevailed in the district court.

[7] The district court's failure to consider the defenses raised does not preclude this court from considering them. *See INVST*, 815 F.2d at 398. Among the defenses that have been raised by Electro in this action are denials of any acts of monopolization, conspiracy or illegal tying. Electro has also asserted that its total volume of trade in the field (approximately .7 percent of the light bulb market) is insufficient as a matter of law to pose any threat of monopolization. Since the district court refused to hear any evidence going to the merits of this defense, we will give the benefit of the doubt to the defendant.

We now turn to Electro's argument that all disputes involved in this litigation properly belong in arbitration. One possible problem with Electro's arbitration argument is that the district court rejected the argument in ruling on Electro's motion to dismiss, and that ruling is not squarely before this court. However, upon remand, we see nothing to preclude the district court from reconsidering its ruling on the arbitration issue. *See Hester*, 879 F.2d at 175 (district court properly granted relief from judgment so that it could reconsider its jurisdiction in an adversary proceeding); *Jackson*, 794 F.2d at 1496 n. 3 (same).

[8] On language that is not unlike the language in the arbitration clause in this case, the Supreme Court held that a commercial agreement between international participants required submission of alleged antitrust violations to arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The Court was persuaded to read the agreement liberally in favor of arbitration because of a "healthy regard for the federal policy favoring arbitration." *Mitsubishi*, 473 U.S. at 626, 105 S.Ct. at 3353. We need not render a dispositive ruling on the arbitration clause in this case to point out that the district court's duty to consider meritorious defenses, in light of *Mitsubishi Motors*, required more than a mere recitation in an earlier ruling that the antitrust claims were not claims "arising in connection with the present contract." In sum, we are persuaded that Electro asserted a potentially meritorious defense.

[9] The final factor we consider is Electro's culpability. In order to be treated as culpable, "the conduct of a defendant must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings." *INVST*, 815 F.2d at 399 (quoting *Shepard Claims Serv., Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 194 (6th Cir. 1986)). Other than notice that

would be imputed by virtue of the district court's docket sheet, it is not clear that Electro's counsel knew of discovery violations until March of 1989, approximately five months before the entry of the default judgment. Although it is true that the request for document production was pending for a long period of time, Electro's culpability is lessened by the fact that prior to March of 1989 the litigation focused on issues which might have made discovery unnecessary. We also note that for several months in 1988 discovery was foreclosed while an earlier appeal was pending. Thus, Electro's failure to respond, although not commendable, falls short of showing a reckless disregard for the effect of its conduct.

Moreover, plaintiff's counsel accepted as true Electro's assertion that the delay was caused by the disarray resulting from a flood in Electro's offices and a subsequent move, and Electro's New York counsel offered a plausible explanation for the reason Electro's problem was not brought to the court's attention earlier. These problems were compounded by a language barrier plus cultural, governmental, and political differences. Thus, contrary to plaintiff's assertion that none of the criteria of Rule 60(b) have been met, we believe Electro has shown "excusable neglect" under 60(b)(1) and, arguably, "other reason[s] justifying relief" under 60(b)(6).

Our conclusion is further strengthened by the sheer size of the damage award in this case. *See Hester*, 879 F.2d at 175 (recognizing that the substantiality of the award was a factor in favor of a trial on the merits). This is especially true given that the *sole proof of damages* was an affidavit of the president of the plaintiff corporation in which he recognized that he was only able to approximate the cost of sales in computing lost profits. Moreover, the amount specified in the affidavit was later characterized as an "estimate" by plaintiff's attorney in oral arguments on the default

motion. *See* J.A. 326. Any error in this "estimation" was tripled by the award of treble damages.

III.

In summary, we recognize that Electro was not a model litigant in this case; however, the same is true of Amernational who sought to begin this case by serving process and a discovery request upon an entity other than the defendant. We also point out that the district court added to Electro's problems when it failed twice in this case to provide notice to Electro of significant events in the litigation. Even if the district court was justifiably frustrated by Electro's actions, this did not relieve the court of its duty to do substantial justice according to the factors we have identified for passing on Rule 60(b) motions for relief from judgments. Those factors, in light of the facts of this case, convince us that the district court clearly abused its discretion in denying Electro relief from the default judgment. Accordingly, the default judgment entered by the district court is VACATED, and this case is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

JUDGMENT

(United States Court of Appeals — Sixth Circuit)

(Filed February 14, 1991)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff-Appellee, v. ACTION-TUNGSRAM, INC., Defendant; ELECTROEXPORT-IMPORT, Defendant-Appellant — No. 90-1050)

Before: **Keith**, and **Milburn**, Circuit Judges;
Contie, Senior Circuit Judge

ON APPEAL from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is vacated, and the case is remanded for further proceedings consistent with the opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

Issued as Mandate: *March 13, 1991*

COSTS: *Taxed Against Appelle*,
Filing Fee .....$ *105.00*
Printing .....$ *1,062.40*
Total .....$ *1,167.40*

(*Certification Omitted*)

APPENDIX C

STIPULATION AND ORDER OF DISMISSAL WITHOUT PREJUDICE AS TO DEFENDANT ACTION TUNGSRAM, INC.

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed June 29, 1989)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff, v. ACTION TUNGSRAM, INC., and ELECTROEXPORTIMPORT, Defendants — Case No. 86-CV-70270-DT; Hon. BARBARA K. HACKETT)

Plaintiff Amernational Industries, Inc. and Defendant Action Tungsram, Inc., hereby stipulate and agree that Plaintiff's Complaint against Defendant Action Tungsram, Inc., only be dismissed without prejudice and without costs to either party. This dismissal shall have no effect on Plaintiff's claims against Defendant Electroexport-import.

PLAINTIFF, AMERNATIONAL
INDUSTRIES, INC.
By: /s/ CASIMIR L. RYGIEL
Its President

/s/ WILLIAM J. LAMPING (P30785)
Counsel for Plaintiff
Vestevich, Dritsas, McManus,
Evans, Payne & Vlcko, P.C.
800 W. Long Lake Rd., Ste. 200
Bloomfield Hills, MI 48013

DEFENDANT, ACTION TUNGSRAM, INC.
By: /s/ RICHARD E. RASSEL (P19243)
(WJL)
Counsel for Defendant,
Action Tungsram, Inc.
1881 First National Bldg.
Detroit, MI 48226

Dated: June 25, 1987

APPENDIX D

ORDER TO SHOW CAUSE

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Filed July 8, 1987)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff, v. ELECTRO-EXPORTIMPORT, Defendant — CIVIL ACTION NO. 86-70270; HON. BARBARA K. HACKETT, UNITED STATES DISTRICT JUDGE)

IT IS HEREBY ORDERED that defendant appear before the Court on August 26, 1987 at 2:00 p.m. to show cause why the attached Default Judgment against defendant Electro-exportimport should not be entered.

/s/ BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

DATED: July 24, 1987

(Certification Omitted)

APPENDIX E

ORDER DENYING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT, GRANTING PLAINTIFF'S MOTION FOR SANCTIONS, GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS IV, VI, AND VII, AND DENYING DEFENDANT'S MOTION TO DISMISS COUNTS I, II, III, AND V

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated December 17, 1987)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff, v. ELECTRO-EXPORTIMPORT, Defendant — CASE NO. 86-CV-70270-DT; HON. BARBARA K. HACKETT)

This matter is presently before the court on plaintiff's motion for default judgment or sanctions and defendant's cross-motion for dismissal. Defendant's motion to dismiss is premised on two grounds: 1) plaintiff's failure to properly serve defendant; and, 2) plaintiff's failure to submit this dispute to arbitration.

BACKGROUND

Plaintiff is a Michigan corporation which imports goods from foreign countries for resale to domestic manufacturers. As part of this business, plaintiff imports light bulbs from foreign countries.

On January 22, 1986, plaintiff filed suit against Action-Tungsram alleging various anti-trust violations arising out of the importation and sale of light bulbs. On August 20, 1986, pursuant to an order entered by Magistrate Thomas A. Carlson, plaintiff filed an amended complaint naming

Electroexportimport (Electro) as a defendant. Electro is a government owned and controlled trading company of the Socialist Republic of Romania. As part of its business, Electro exports incandescent light bulbs to the United States.

On October 10, 1986, the Clerk of the Court mailed a copy of the amended complaint to Electro in Romania in accordance with the Michigan Court Rules. On December 30, 1986, proof of service was posted in Romania and was filed with this court on January 15, 1987. On January 13, 1987, defendant Electro responded to the complaint by stating that the dispute properly belonged in the Arbitration Court by the International Chamber of Commerce in Paris, France. Electro fruther answered that the contract between it and plaintiff did not require that they sell light bulbs exclusively to plaintiff; that plaintiff had failed to purchase bulbs in sufficient amounts to comport with the terms of the contract; and, that since Electro had no influence on the American light bulb market, it was not subject to the Clayton Act. Electro filed no appearance.

After receiving defendant's response, this court set a scheduling conference to be held March 23, 1987, at 2:40 p.m. The court inadvertently failed to notify Electro of this conference, which was then adjourned to April 30, 1987, at 2:20 p.m. A status conference was set for June 9, 1987. Electro did receive notice of these conferences, yet failed to appear.

On June 29, 1987, Action-Tungsram was dismissed with prejudice per stipulation of the parties.

On June 29, 1987, plaintiff filed a motion for sanctions and default judgment against Electro based on Electro's failure to obtain local counsel, failure to file an appearance, and failure to appear at the June 9, 1987, pretrial conference. A copy of this motion was served on defendant. Defendant failed to respond.

On July 28, 1987, this court ordered defendant to appear before it on August 26, 1987, to show cause why default judgment in excess of $11 million should not be entered. On August 12, 1987, this hearing was adjourned to September 16, 1987, at 2:00 p.m. based on counsel's representations that a settlement was being negotiated. Thereafter, defendant requested an additional sixty (60) day adjournment which was denied. (*See* order dated August 19, 1987)

Finally, on September 15, 1987, defendant filed its brief in opposition to the Order to Show Cause. In addition, defendant filed a cross-motion to dismiss. Oral argument was heard on these motions on September 16, 1987.

SERVICE OF PROCESS

Plaintiff and defendant both agree that service of process on defendant is governed by 28 U.S.C. § 1608(b)(3), which provides:

> if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by a delivery of the summons and complaint, together with a translation of each into the official language of the foreign state —
>
> * * *
>
> (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served.

Defendant argues that the proof of service is insufficient because it does not state that a copy of the summons and complaint translated into the official language was made. Defendant does not dispute that it in fact received a copy of the summons and complaint translated into Romanian.

Insufficient proof of service will not affect an otherwise valid service of process. Service of process in this case was consistent with the requirements of 28 U.S.C. § 1608(b)(3)(B). Defendant's motion to dismiss on this basis must be denied.

ARBITRATION AGREEMENT

Defendant also moves to stay or dismiss this lawsuit pursuant to a provision in the applicable contract which states that:

> Any dispute between parties arising in connection with the present contract will be settled amiably by the two parties. In the event that the parties are not able to settle their dispute, they agree to submit the dispute to the International Court of Arbitration of the Chamber of Commerce in Paris. The arbitrators will solve the dispute in accordance with the contractual clauses. The French material law is to be applied. Place of arbitration will be Paris. The decision of the arbitrators is final and binding for both parties. In the event of litigation or arbitration, the parties agree not to apply to their respective courts for Order of Attachment of the other party's assets, including letters of credit.

Plaintiff's amended complaint contains seven (7) causes of action: 1) violation of the Clayton Act; 2) violation of the Sherman Act; 3) the existence of a tying agreement in violation of the Sherman Act; 4) tortious interference of a contractual relationship by Action-Tungsram; 5) conspiracy to lessen competition; 6) breach of contract; and, 7) breach of contract. Since Action-Tungsram has been dismissed, Count IV is no longer viable. Further, Counts VI and VII clearly belong in arbitration and must be dismissed.

However, the arbitration clause does not compel all disputes arising between the parties to arbitration, but only those claims "arising in connection with the present contract." The fact that the parties contemplated that some situations could arise not subject to arbitration is evidenced by the provision that "[i]n the event of litigation or arbitration, the parties agree not to apply to their respective courts for an Order of Attachment of the other party's assets, including letter of credit."

Counts I, II, III, and V, allege an agreement between defendant and Action-Tungsram to refuse to deal with plaintiff in an attempt to force plaintiff out of business and significantly lessen the competition in the national ultraviolet light bulb market. These claims do not "arise in connection with the contract between plaintiff and defendant" and are properly before this court.

DEFAULT JUDGMENT

Plaintiff moves for the entry of a default judgment against defendant in excess of $11 million. Plaintiff seeks this motion for defendant's failure to appear at a status conference, and failure to obtain local counsel.

Clearly, defendant has been dilatory in this matter. However, to award plaintiff over $11 million because defendant has failed to appear at a conference and failed to obtain local counsel would be unjust and extreme. Plaintiff's motion for default judgment is denied. However, this court finds that defendant's breaches were purposeful attempts to delay this matter. Accordingly, plaintiff's motion for sanctions in the amount of plaintiff's costs is granted.

IT IS ORDERED that defendant's motion to dismiss for improper service is denied.

IT IS ORDERED that Counts IV, VI, and VII, are dismissed and that defendant's motion to dismiss the remaining counts is denied.

IT IS FURTHER ORDERED that plaintiff's motion for default judgment is denied. However,

IT IS ORDERED that plaintiff's motion for sanctions is granted. Plaintiff shall submit to the court within thirty (30) days it costs for attending the status conference(s) at which defendant failed to appear and for bringing its motion for default judgment.

/s/ BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: December 17, 1987

(Certification Omitted)

APPENDIX F

ORDER DISMISSING APPEAL

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals — Sixth Circuit)

(Filed April 22, 1988)

(ELECTROEXPORTIMPORT, Defendant-Appellant, vs. AMERNATIONAL INDUSTRIES, INC., Plaintiff-Appellee — No. 88-1088)

BEFORE: **KEITH**, **MARTIN** and **NELSON**, Circuit Judges.

The defendant in this antitrust action appeals the district court's order dated December 23, 1987, which granted in part and denied in part the defendant's cross-motion for dismissal. Three of the seven counts in the amended complaint were dismissed as involving disputes of a sort that the parties had contractually bound themselves to submit to arbitration. The plaintiff has moved to dismiss the appeal on the ground that the order appealed from is not final for purposes of 28 U.S.C. § 1291. The defendant opposes that motion.

This Circuit has previously held that such orders are appealable if, under the Enelow-Ettelson doctrine, the predominant nature of the underlying claims is legal. *Liskey* v. *Oppenheimer & Co.*, 717 F.2d 314 (6th Cir. 1983); *Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017 (6th Cir. 1979); *Dorton* v. *Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. 1972); see *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379 (1935); *Shanferoke Co.* v. *Westchester Co.*, 293 U.S.

449 (1935); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942).

In the recent case of *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, No. 86-1329, 56 U.S.L.W. 4243 (U.S. March 22, 1988), however, the United States Supreme Court has repudiated the Enelow-Ettelson doctrine, rendering an interlocutory order such as this no longer appealable.

It is **ORDERED** that the motion to dismiss this appeal be granted.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman,
Clerk

ISSUED AS MANDATE: June 2, 1988

COSTS: NONE

(*Certification Omitted*)

APPENDIX G

SCHEDULING ORDER – CIVIL

(Including Instructions for Preparation of Final Pretrial Order)

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated May 19, 1988)

(*AMERNATIONAL INDUSTRIES*, Plaintiff, - vs - *ELECTRO*, Defendant — NO. 86-0270; HON. BARBARA K. HACKETT)

IMPORTANT: YOU WILL RECEIVE NO FURTHER NOTICE OF THE DATES AND REQUIRED COURT APPEARANCES CONTAINED IN THIS ORDER.

1. Closing date for all discovery: *12/31/88*

2. Cut-off date for filing of all motions: *1/23/89*

NOTE: THE COURT HAS DETERMINED THAT IN THIS CASE DISCOVERY MATERIALS ARE NOT TO BE FILED WITH THE COURT — SEE "A", PAGE 2* *infra*. FURTHER, LOCAL RULE 17(a) REQUIRES THE MOVING PARTY TO SEEK CONCURRENCE OF OPPOSING PARTY *BEFORE* FILING ANY MOTIONS.

3. Date and time of status conference: _____

4. Date for referral to mediation: _____

5. Date for submission of final pretrial order: *3/16/89*
(SEE PAGE 2* FOR INSTRUCTIONS AS TO FINAL PRE-TRIAL ORDER.)

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* [*Printer's Note*]: Page 2 omitted in this reproduction.

6. Date and time of final pretrial conference:
3/23/89 @ 2:00

TRIAL COUNSEL MUST BE PRESENT AT THIS CONFERENCE, AS WELL AS ALL PERSONS NECESSARY TO MAKE A FINAL DECISION AS TO SETTLEMENT.

7. Trial date: *4/3/89* Jury: ___ Non-Jury: X

8. Other matters: *No settlement conf in ct. — Magistrate*

APPENDIX H

ORDER IMPOSING SANCTIONS AGAINST DEFENDANT AND GRANTING PLAINTIFF COSTS

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated November 7, 1988)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff, vs. ELECTROEXPORTIMPORT, Defendant — CASE NO. 86-CV-70270-DT; HON. BARBARA K. HACKETT)

Having reviewed Plaintiff's Statement of Costs, which was submitted pursuant to the court's order of December 17, 1987, granting plaintiff's motion for sanctions and awarding it costs for attending the status conference(s) at which defendant failed to appear and for bringing its motion for default judgment, the court awards plaintiff $2,300.00 in costs. Accordingly,

IT IS SO ORDERED.

/s/ BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: November 7, 1988

(Certification Omitted)

APPENDIX I

AMENDED SCHEDULING ORDER – CIVIL

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated March 24, 1989)

(*AMERNATIONAL IND.*, Plaintiff, -vs- *ACTION-TUNGSRAM, INC.*, Defendant — NO. 86-0270; HON. BARBARA K. HACKETT)

IMPORTANT: YOU WILL RECEIVE NO FURTHER NOTICE OF THE DATES AND REQUIRED COURT APPEARANCES CONTAINED IN THIS ORDER.

1. Closing date for all discovery: _____

2. Cut-off date for filing of all motions: _____

NOTE: THE COURT HAS DETERMINED THAT IN THIS CASE DISCOVERY MATERIALS ARE NOT TO BE FILED WITH THE COURT — SEE "A", PAGE 2* *infra*. FURTHER, LOCAL RULE 17(a) REQUIRES THE MOVING PARTY TO SEEK CONCURRENCE OF OPPOSING PARTY *BEFORE* FILING ANY MOTIONS.

3. Date and time of status conference: _____

4. Date for referral to mediation: _____

5. Date for submission of final pretrial order: *May 1, 1989*

6. Date and time of final pretrial conference: _____

---

* [*Printer's Note*]: Page 2 omitted in this reproduction.

TRIAL COUNSEL MUST BE PRESENT AT THIS CONFERENCE, AS WELL AS ALL PERSONS NECESSARY TO MAKE A FINAL DECISION AS TO SETTLEMENT.

7. Trial date: *May 23, 1989* Jury: ___ Non-Jury: X

8. Other matters: M *for default Judgment under advisement (oustanding discovery)*

APPENDIX J

ORDER TO SHOW CAUSE

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated July 12, 1989)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff, vs. ELECTROEXPORTIMPORT, Defendant — CASE NO. 86-CV-70270-DT; HON. BARBARA K. HACKETT)

IT IS ORDERED that defendant show cause in person on August 2, 1989, at 3:30 p.m. why plaintiff's motion for entry of default and default judgment against defendant should not be granted.

The parties should also be prepared to address plaintiff's motion to strike defendant's amended answer and counterclaim, if the court finds it appropriate to do so.

/s/ BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: July 12, 1989

(*Certification Omitted*)

APPENDIX K

PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of August 2, 1989)

(AMERNATIONAL INDUSTRIES, Plaintiff, v. ACTION-TUNGSRAM, INC., and ELECTROEXPORTIMPORT, Defendants — CASE NO. 86-CV-70270)

PROCEEDINGS had and taken in the above-entitled matter before the Honorable BARBARA K. HACKETT, United States District Court Judge for the Eastern District of Michigan, Southern Division, at U. S. Courthouse, 231 W. Lafayette, Room 860, Detroit, Michigan, on Wednesday, August 2, 1989, at approximately 3:00 o'clock p.m.

APPEARANCES: WILLIAM LAMPING, ESQ., Appearing for the plaintiff; DAVID PARUCH, ESQ., Appearing for defendant Electroexportimport.

(3) Detroit, Michigan
Wednesday, August 2, 1989
3:00 o'clock p.m.

THE CLERK: Case number 86-702708, *Amernational* versus *Electroexportimport*.

THE COURT: Will the attorneys please introduce themselves for the record?

MR. LAMPING: Good afternoon, Your Honor, William Lamping representing plaintiff.

MR. PARUCH: Your Honor, David Paruch, Clark Klein and Beaumont, representing the defendant Electroexportimport.

THE COURT: We're before the Court his afternoon to show cause why the plaintiff's motion for entry of default, and default judgment against defendant, should not be granted.

Counsel, is there anyone here representing the defendant? I mean, other than counsel, do you have a client or party with any authority in this case present this afternoon?

MR. PARUCH: In the courtroom, no, I do not.

THE COURT: That order said "in person," and I had hoped that you would have someone here, counsel, that I could talk to, or that I might be able to address so (4) that we could move in this matter. There seems to be some problem.

MR. PARUCH: If the Court please, I would indicate that I did not understand the order to — I certainly understood the invitation. I did not understand the order to be in person.

THE COURT: That's fine. I could have made it more clear.

I would like to hear from the defendant, why default shouldn't enter in this case, or are you going to stipulate default enter, counsel?

MR. PARUCH: No, Your Honor, I'm not.

THE COURT: All right.

MR. PARUCH: Your Honor, I will stipulate to the Court that compliance with and response to the discovery issues that are the nature and the gravamen of the motion to enter default has certainly been delayed. And I will advise the Court that we have sought diligently to produce documents in our possession and, once in our possession, those document have been produced.

THE COURT: Counsel, what's your client doing? They can't just fall back on the fact that they are an ocean apart.

MR. PARUCH: Perhaps — let me ask this. Is the Court aware of the fact that documents have indeed been (5) produced to plaintiff's counsel as of Monday of this week?

THE COURT: It took a show cause order almost to get them, didn't it, counsel?

MR. PARUCH: Your Honor, I understand that. I just want the record to be clear.

THE COURT: Perhaps I should hear from plaintiff's counsel first. Although this is the Court's invitation for you to show cause, maybe the plaintiff could explain where they are today, why they feel the motions — judgment should not enter or, rather, the order granting default judgment should — default judgment should enter.

MR. LAMPING: We reread [*Handwritten:* received] on Monday, Your Honor, a package of 87 pages of documents from the defendant. The documents, Your Honor, were merely that, a package. There's no formal response yet received. Counsel's indicated to me that he has prepared such a document, but has not gotten it signed by his client.

In reviewing this response to the document [*Handwritten:* request], it appears on its face to me to be incomplete production. Many of the documents that we requested in — for example, asked about relationships that defendant Electroexportimport had with another company, Action-Tungsram. There's no document in this package that was produced to me that even mentioned Action-Tungsram.

(6) The package which was produced, I think, can be fairly characterized as mostly documents relating to shipment transactions. There's memorandums and bills of lading, freight bills, telexes regarding payments, and credits against letters of credit, extensions of those letters of credit, documents relating to certificates of origin for goods being imported through the customs service. None of these are particularly enlightening types of documents, as far as our purpose.

We need to talk or find information about the relationship between this company and the company we allege coconspired with them and monopolized the market. None of

those documents have been produced. None of the records of communications between the parties have been produced. No telexes or phone records have been produced. I'm referring to just our request for production of documents, which was served in '86, in late 1986, which was the subject of our motion for default.

I think that we can say, for our purposes, that there just has not been a substantial compliance with these document requests even at this late hour. I note that we filed our motion for default in early June. We received these documents in — at the end of July. The documents were produced at the last moment.

This is a similar pattern to the previous (7) actions of this defendant. They didn't respond to — even retained counsel in response to earlier motions for default until literally one or two days before the hearing on the motion.

The actions of the defendant, I think, show a contempt for the process of this Court and a contempt for the legal proceedings of this country. The appropriate remedy, I think, is an entry of default at this point. We're on the Court's spin off docket. We could be called to trial anytime. And even though we've received these documents now, we're going to need a lot of time just to go through them and figure out as much that — of what we have versus what we don't have.

We produced several hundreds of pages of documents already to the other defendants. I've made a comparison of what we have versus what we received from them, and the fact that there are gaps in those two documents raises many questions as to just the production itself. So we have a lot of problems, if we're supposed to be getting ready for trial on a moments notice to deal with even the production we received. For all these reasons we think a default should enter.

THE COURT: Counsel, did you ever receive a check for the costs previously entered by this Court?

MR. LAMPING: Yes, we did. That occurred at an (8) earlier pretrial conference. When we had made a motion for sanctions for that the check was produced again at the day of hearing. That's when we were paid.

THE COURT: Counsel, perhaps you could respond. I think we'll concede this is a 1986 case. They are still seeking what I believe is appropriate discovery.

MR. PARUCH: Your Honor, if I may. Several issues on that, several items as to that:

1. If the Court recalls, some of the procedural history of this case — and it is a garbled case without doubt — the Court will recall that there was significant periods of time and apparently — apparently significant amount of docket entries relating to discussions of service of my client.

The service of these interrogatories — of I take that back — request for production of documents occurred in the normal manner without translation, or any other item, at a point before anyone had appeared or before the letter which is the subject of the other matter before the Court this afternoon had been received in court. It was issued basically to two defendants at the same time, one to Action, which is apparently a defendant in the case — and this was mailed off, I don't know where.

When we became aware of the fact that there was (9) this pending discovery issue — and frankly, Your Honor, there is no doubt we would like to have these documents to defend the case as well.

When we became aware of the request for production of documents, and the fact that it was outstanding and there was about to be a motion filed with respect to it, we've made clear to our client that the documents are to be produced.

Now, we have an understanding as to certain of the documents that we have received and submitted. There are other categories of documents that I wish to confirm with

the client in writing, but I have information from the client that there are no such documents to be produced.

Now, I make reference, for example, to request number 4, copies of all documents relating to dealings at any time between plaintiff and any other Romanian entity. I'm advised we don't have any such documents, and we will so submit in writing on confirmation from the client.

There are a couple of categories of documents where we believe that additional production is required and we have so advised at the client. We expect that the client will finally listen to us and produce the documents for our benefit, as well as for presentation to plaintiff's counsel.

(10) There are a number of issues in the request for production that, for example, request identification or — correction, production of a piece of paper that says the name of an expert witness. That, Your Honor, I would submit, is not a proper request for production of documents.

There are other items within this request, such as request for copies of passports, which under Romanian law we are told it is illegal for them to certify and produce. So there are some issues that we're going to have to resolve here in the production and with respect to the request itself.

It is our intention, and I advised counsel before the hearing, and I advised the Court before, at this time we prepared a draft of a formal written response. Now that we have the documents that have been produced, it is our intention to have that certified and submitted to the Court. I think that will resolve a great deal of the issue before us and it will narrow to one or two areas issues as to other documents which may be produced, and I hope to have those produced because frankly, Your Honor, I want them just as well.

THE COURT: Counsel, you're not a third-party, you're the client, and that client is not assisting you in doing

what you want to do for your client. Do they have (11) any appreciation of how serious this is and this case will not sit on this docket just until they're ready?

MR. PARUCH: We have — and I say "we" advisedly because co-counsel with me in New York and I have sent telexes and sent correspondences, sent communications through the Trade Embassy here in New York advising the client that, frankly, that this Court is not about to sit and wait for the client to decide when it is appropriate. And it is our understanding — and I make this representation to the Court — that it is an understanding that that information has sunk in and that we have, as a consequence, at least been able to get these documents for presentation.

I had committed to the Court and to the parties in writing, in responding to this motion, that on receipt of the documents they would be reviewed by — briefly for relevance and would be submitted.

I will note to the Court that the documents were physically received in my office last Friday, a day when I was in Ann Arbor. I reviewed them over the weekend and entered them in on Monday. I intend, as quickly as we get them, to turn them over.

I understand the Court's frustration and share the Court's frustration in moving this case forward.

One of the things, I think probably most (12) important for us to recall in this case, is that at the heart of this case we have a commercial dispute over sale of light bulbs between two companies in the United States, and we have breach of contract claims which are really the gravamen of this case. And those claims, according to the Court's prior order, have been found to be — under the arbitration provisions — to go to the International Chamber of Commerce in Paris, and that's where they should be resolved. Frankly, that's where this whole case should be resolved.

What we've got left are some allegations as to antitrust violations. When we can confirm some information we will

submit documentation to plaintiff's counsel and to the Court indicating that the market share of these light bulbs varies between 0.4 percent and 0.7 percent of the U.S. market. As a matter of law that's not going to affect market price.

THE COURT: Counsel, what do you think are the dollars involved in this case?

MR. LAMPING: For plaintiff, Your Honor?

THE COURT: Yes.

MR. LAMPING: My client submitted an affidavit in connection with these earlier motions for entry of default judgment, which my recollection we're talking of seven figure numbers. He has produced substantial (13) correspondence and commitments, contracts from people agreed to purchase these light bulbs from him, based on the fact they were being sold at a substantial lower price then other comparable bulbs. His estimates are quite substantial in terms of lost profits.

MR. PARUCH: Frankly, Your Honor, all of which, if proved, and if proveable in a breach of contract action, are subject to the remedy of the arbitration in Paris, which this Court has already recognized as the primary area in which this commercial dispute ought to be resolved.

THE COURT: Can you not settle this part of it?

MR. LAMPING: Your Honor, the parties, as far as I know, have been talking about settlement for three years.

THE COURT: My docket sheet so indicates. Every time my clerk makes an inquiry she puts a little note. There's still time to resolve and settle in this matter. Anything happen, or anything the Court can do to assist in getting on with this? It's getting very expensive and nothing is happening.

MR. LAMPING: I'd observe, only time I've ever seen any movement is when something happens in the Court, when a motion is about to be heard or when a default is about to be entered, then something happens a day or two (14) beforehand, but nothing else.

THE COURT: Can you respond to that, counsel? I realize you're at a disadvantage because your client isn't readily available to you, but they're certainly not limited.

MR. PARUCH: I would suggest to the Court that, without doubt, we don't wait until just prior to a scheduled hearing to respond to deal with our client. It is an ongoing, continuing matter. I don't want the Court to get that impression.

THE COURT: Well, I'm not faulting you —

MR. LAMPING: I don't wish to create that impression.

THE COURT: No, I understand. You can only work with what your client can give you. Your client's not here and you are, and you're trying to explain to the Court the position you're in, but it's really your client's position.

Do you think there's any hope of resolving this or some type of settlement in the near future?

MR. PARUCH: Your Honor, I guess what I would suggest, and I make this suggestion solely on the basis of my understanding of the case and not with any discussion with the client, is that if this Court were to enter — I would hate to say this — in other words — this time with (15) our understanding, when the Court says "in person" it means not just counsel and not just New York counsel, but also a responsible trade official from my client's home country.

I think that we could materially advance this case. Whether we had that discussion in the Court's chambers, or in our offices, or plaintiff's counsel's offices, or more likely in New York where it would be easier for all parties to convene — it would be difficult obviously for the Court to have the appropriate hammer of the parties heads if we were in New York, but I would suggest to the Court that may well be.

It appears to me, and I think it appears to the Court, and I think, frankly, it appears to plaintiff's counsel, that this case should resolved on the issues remaining. And

without disclosing anything, I think the tenor of discussions has been in that realm; that the rest of the commercial dispute should be dealt with in that proper form. And I would respectfully suggest to the Court that this rambling response perhaps would suggest entry of another order as a settlement conference.

THE COURT: Counsel, what I'm going to do at this time is to grant the plaintiff's motion for entry of a default judgment. And I will entertain a motion from you to set that aside, if you can persuade the Court it's (16) appropriate to do so.

I am very concerned without taking very strong action at this time that this case will just be further delayed and your client will just assume that in the process of things it will go on indefinitely. I cannot do so. They have not stepped — complied with the rules. I'll state on the record, it's through no fault of, counsel.

They well know the Court's intention that this case move. If they intended to defend this case they had to give you what was needed to defend. And based on what I have before me, I think that entry of a default judgment at this time is appropriate.

I just state in closing that I will entertain a motion to set that aside if there are reasons why I should do so. Possibly you can look to bringing the necessary persons together or parties and attempt to resolve it. But short of that, plaintiff will have their judgment. Thank you all.

MR. LAMPING: Thank you, Your Honor.

MR. PARUCH: Thank you, Your Honor.

THE CLERK: Court is in recess.

* * *

APPENDIX L

DEFAULT JUDGMENT AGAINST DEFENDANT ELECTROEXPORTIMPORT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated August 29, 1989)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff, v. ELECTRO-EXPORTIMPORT, Defendant — Case No 86-CV-70270-DT; Hon. BARBARA K. HACKETT)

This matter having come before the Court on Plaintiff's motion for entry of default and default judgment, and the issues having been duly heard and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED:

That the Plaintiff, Amernational Industries, Inc., recover of the Defendant Electroexportimport the sum of $11,070,000.00 in damages, and the sum of $154,200.00 for attorneys' fees, a total of $11,224,200.00, together with interest thereon at the annual rate of seven (7%) percent, ~~computed daily until the date of payment and compounded annually~~; and costs in the amount of $677.62. BKH

Dated at Detroit, Michigan, the 29 day of August, 1989.

/s/ BARBARA K. HACKETT
U.S. DISTRICT COURT JUDGE

Approved as to form:
David H. Paruch (P25603), Attorneys for Defendant
/s/ William J. Lamping (P30785), Attorneys for Plaintiff

(*Certification Omitted*)

APPENDIX M

HEARING ON MOTIONS: 1) TO EXECUTE ON JUDGMENT; 2) TO SET ASIDE JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of December 21, 1989)

(AMERNATIONAL INDUSTRIES, Plaintiff, v. ACTION-TUNGSRAM, INCORPORATED, Defendant — CIVIL ACTION NO. 86-CV-70270-DT)

Proceedings had in the above-entitled matter before the Honorable Barbara K. Hackett, United States District Judge of the Eastern District of Michigan, Southern Division, at #860 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Thursday, December 21, 1989.

* * *

(30) * * * THE COURT: Your witness, Counsel.

MR. BELLSEY: Thank you, Your Honor. As I say, Mr. Ionescu is going to testify not only to the justifiable excuse, but to the good faith defense we believe we have on the merits to this litigation which we believe it's necessary to demonstrate in order to vacate the Default.

THE COURT: Well —

MR. LAMPING: Your Honor, I would object to testimony on the issue of the merits.

It's not relevant under Rule 60(B) which are the grounds that Defendant must proceed under now to convince (31) the Court to set aside the Judgment. Those considerations are set forth explicitly in the rule and none of them include a meritorious defense.

MR. BELLSEY: I believe there's a fair amount of judicial discretion under Rule 60 and Rule 55, Your Honor, where you do have the discretion to make such allowances as you see fit and proper.

* * *

THE COURT: Which of those sections are you relying on, Counsel, on the Rule 60(B) motion, specifically, 1, 2?

MR. BELLSEY: 60(B), Mistake, Inadvertance and Excusable Neglect, subsection (1).

THE COURT: It's 60(B)(1); is that correct?

MR. BELLSEY: Also Subsection (B)(2), Newly Discovered Evidence.

THE COURT: What newly discovered evidence?

MR. BELLSEY: Well, as Mr. Ionescu will amply demonstrate through his testimony, what happened in this case, Your Honor, was in 1984 Electroexportimport deemed this contract to have been a closed file.

The shipments to — it's only at the end of 1986, in December of 1986, that Electroexportimport was served by the Clerk of the Court and brought in as a party.

(32) At that time, at that time this file had been closed in the offices of Electroexportimport.

In the intervening two years from the closure of the file to the first time hauled into court, Electroexportimport had put this file into storage.

In 1985, which was during that summer period, Your Honor, Electroexportimport moved its offices from a larger office to a smaller building.

As Mr. Ionescu will explain, during the move, all the files in the company were in disarray. The company does over a thousand export sales contracts a year, Your Honor.

Mr. Ionescu is prepared to testify, if given the chance, as to the disarray, the resulting disarray being a primary cause for the failure of his personnel, his staff, to locate this particular file.

In addition to that, Mr. Ionescu is prepared to testify that there was a flood. And I don't know whether it was at his old office or his new office, I believe his new office, and that further damaged the archives; and, accordingly, even to this day, there is [*sic*] still files that are missing with respect to other cases.

Mr. Ionescu has indicated to me that he has produced everything that can be discovered pertaining to this case.

However, because of the disarray of the records (33) caused by both the move and the flood, Mr. Ionescu is prepared to give sworn testimony, Your Honor, that this material was not located any quicker than it was and could be produced. And immediately upon its location, was produced to me and in turn produced to Mr. Paruch who, in turn, immediately produced to Plaintiff's counsel.

THE COURT: Did you at any time file a motion for extension of time within which to comply with the production ordered in this case?

MR. BELLSEY: Quite frankly, I was unaware of this reason until this week.

THE COURT: After the fact, correct, Counsel?

MR. BELLSEY: Correct.

THE COURT: You may develop it. I'm not going look [*sic*] to the merits of the defense.

I'll hear the reasons for our being in Court at this late date when Judgment is entered in this case as your client wishes to explain his circumstances, but not the merits of the defense, Counsel.

MR. LAMPING: If it will move things along, we'll offer to agree to this recitation of the reasons why there was a delay, that we'll accept these as factual statements, for purposes of this record, that there was a flood and there was a move and that the records were in disarray.

THE COURT: That much is stipulated or accepted as (34) true.

MR. LAMPING: For purposes —

THE COURT: For that limited purpose.

MR. LAMPING: — for purposes of this motion, we'll accept that. If that will satisfy Mr. Bellsey's desire to make a record, he may proceed.

* * *

THE COURT: All right, Counsel. Thank you. It will not be necessary, then, for the witness to testify.

Counsel has accepted as true, for the limited purpose of this hearing, the reasons you present on this record for not producing these documents sooner. Thank you. Anything else, Counsel?

MR. BELLSEY: Not at this time, Your Honor.

THE COURT: Thank you.

* * *

(54) * * * THE COURT: The Court heard this matter in August. I was very concerned at that time that the sanction that (55) would be appropriate would be entry of Default Judgment.

This case and this matter received substantial attention from this Court. And I held hearings and urged persons to attend and the parties to be heard to see what wuld be appropriate disposition.

This case has been on this Court's calendar for some time and it would seem that no matter what the Court attempted to do, the parties, for whatever reason, were not able to comply. I am referring, specifically, to the Defendants.

Now it may well be that they're not familiar with proceedings in the American courts. They were represented by competent counsel. Based on what I have heard, their counsel were keeping them advised, urging them to do what the Court was ordering and requesting.

After the Default Judgment I find on this record, determined at that point the Defendants recognized that this matter was for real and that they would have to cooperate with counsel to avoid what the Court had ordered and that

was payment of substantial dollars. That, I recognize, it's a substantial amount of money. It is not a judgment that this Court entered lightly.

At that point, based upon the rules that I also must follow, the relief requested was appropriate and Default Judgment was entered.

(56) Months after the Default Judgment, I am hearing for the first time some of the reasons the discovery ordered by this Court, production of documents was not provided, and, specifically, what the parties were directed to do.

It's too little too late and I don't find what I've heard today persuasive. I have no sense that if this Judgment was set aside, we would not all be back in another year or two hearing the same reasons why this case couldn't proceed on this Court's docket. Setting aside this Judgment at this time would severally [*sic*] prejudice the Plaintiff.

I don't understand at this time why the Defendants did what they did. And I believe the reasons stated on the record are just not sufficient to set aside the Judgment based on what I have. The rules are clear. There was no mistake or inadvertance.

If the parties were just proceeding as they thought they might and as their circumstances allowed, the rules are clear, there are ways to keep the Court advised to get the time necessary to do what's required to be done.

But from the anything [*sic*] I have before me, the Defendants were not doing so. They have attorneys that definitely were in contact with them. If they weren't following their counsel's advice, they did so at their peril.

The Default Judgment motion to set it aside at (57) this time is denied.

The motion for execution upon the Judgment is granted for the reasons stated on the record and for the reasons well developed in the briefs of counsel.

Thank you all.

(This hearing concluded at 4:28 p.m.)

APPENDIX N

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND ALLOWING PLAINTIFF TO EXECUTE ON THE JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Dated December 29, 1989)

(AMERNATIONAL INDUSTRIES, INC., Plaintiff, vs. ELECTRO-EXPORTIMPORT, Defendant — Case No. 86-CV-70270-DT; HON. BARBARA K. HACKETT)

This court held a hearing on this matter on December 21, 1989.

For the reasons stated on the record, the court orders as follows:

1. Defendant's Motion to Set Aside Default Judgment and to Stay Execution Pending Appeal is DENIED.

2. Plaintiff's Motion for Execution upon Judgment is GRANTED. Plaintiff is permitted to execute on the judgment rendered by this court on August 29, 1989, including garnishment of Electroexportimport's bank accounts and seizure of Electroexportimport's money and property wherever it can be found within the jurisdictional limits of process of the courts of the United States.

SO ORDERED.

/s/ BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: December 29, 1989

(Certification Omitted)

APPENDIX O

RULE 37(b), F.R.CIV.P.

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

* * *

(b) FAILURE TO COMPLY WITH ORDER

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose

designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * *

APPENDIX P

RULE 60(b), F.R.Civ.P.

Rule 60. Relief From Judgment or Order.

* * *

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct or an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FILED
MAY 29 1991
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(2)

No. 90-1770

IN THE

Supreme Court of the United States

October 1990 Term

AMERNATIONAL INDUSTRIES INC.,

Petitioner,

against

ELECTROEXPORTIMPORT,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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(6358—CVR-508)

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No. 90-1770

IN THE

Supreme Court of the United States

October 1990 Term

AMERNATIONAL INDUSTRIES INC.,

Petitioner,

against

ELECTROEXPORTIMPORT,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

Respondent, Electroexportimport ("EEI"), herewith respectfully submits this brief in opposition to the petition of Amernational Industries Inc. ("Amernational"), for a writ of certiorari.

Amernational's "Questions Presented"

Neither of the two questions presented by Amernational in its petition warrants review. Pursuant to Rule 17 of this Court's Rules, a review on writ of certiorari will be granted "only when there are special and important reasons there-

for." Factors controlling or measuring this Court's discretion include a federal Court of Appeals decision in conflict with the decision of another federal Court of Appeals on the same matter, or a decision on a federal question in conflict with a State Court of last resort, or a departure from accepted and usual judicial proceedings, or a State Court decision in conflict with applicable decisions of this Court.

The two questions posed by Amernational do not present any compelling grounds for review. Each can be answered conclusively by elemental research into the application of Rule 60(b), and do not require this Court's guidance, as no conflict in this area exists among the Circuits whatsoever. The answer to each question raised has been unqualifiedly resolved in the affirmative.

Statement of the Case

Amernational, throughout the history of this litigation, has tried to shortcut its way to a judgment by avoiding having to prove its alleged claim. Thus, it interposed a succession of motions for a default judgment. Eventually, its efforts succeeded, and Amernational was granted a default judgment in excess of eleven million dollars, which "damages" were based purportedly on a breach of contract with EEI that was valued, at best, at about one million dollars. The judgment was granted without submission of a scintilla of evidence supporting the alleged damages, except a self-serving affidavit of an officer of Amernational who clearly stated therein that the alleged claim for lost profits was only an "estimate," yet that estimate was trebled in the default judgment (Appendix "A" to petition, page 15). At all times relevant hereto, EEI was an agency or instrumentality of the foreign, sovereign state of Romania, and entitled to all the protections afforded by the

Foreign Sovereign Immunities Act, 28 U.S.C. Sections 1602, *et seq.*, and, in particular, Section 1608(e), which provides:

> ". . . no judgment by default shall be entered by a Court of the United States or of a state against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state unless the claimant establishes his claim or right to relief by evidence satisfactory to the Court."

The reversal by the Sixth Circuit Court of Appeals of the lower Court's grant of the default judgment, is so squarely founded upon the facts and the law, and is in such close conformance with uniform law on the subject, that very little discussion is called for.

Amernational, again, apparently fearful of having to prove its case and give EEI its day in Court, now seeks the intervention of this Court under a scenario which has no relevance or materiality whatsoever. The decision of the Sixth Circuit has in no way prejudiced or foreclosed any of Amernational's rights, nor is it dispositive of the case. On the contrary, it re-opens the case, eliminates a default judgment that should never have been granted initially, and returns the parties to their proofs.

The eleven million dollar default judgment was purportedly entered to punish EEI for not timely responding to a Rule 34 document demand served in and about December, 1986. For over two years, no motion was made by Amernational with respect to that demand, no further demands for compliance were issued, and no other discovery devices of any sort were served by Amernational. Finally, Amernational filed a motion for a default judgment on March 17, 1989, which, itself, violated the District Court's scheduling

order setting December 31, 1988 as the cut-off date for filing of all motions.

At the hearing on Amernational's latest motion for a default judgment, a delegation from Bucharest, Romania traveled some eight thousand miles to assure the District Court that EEI would faithfully comply with all directives and scheduling orders (Appendix "A", page 7). The delegation included EEI's managing director, EEI's legal advisor, and a representative from the Foreign Trade Ministry. They appeared to give their personal assurances that all Court procedures and instructions would be diligently obeyed, to explain why the delays had occurred in the past, and to present EEI's meritorious defenses to the action. The District Court would not take any testimony in that regard (Appendix "M," pages 1-4). The record evidences that the District Court never found EEI to be acting with any degree of bad faith, but only that it was concerned that delays might allegedly prejudice Amernational (Appendix "M," page 5). As the Sixth Circuit held, delay itself is insufficient (Appendix "A", page 12). The only "prejudice" that would result was that Amernational would then have to prove its case.

The subject document demand (Joint Appendix, pages 55-66), was, itself, violative of Rule 34, and required production, in omnibus fashion, of "all documents" relating to dealings at any time between Amernational and any other Romanian entity, all long distance phone records since 1980, all expense vouchers for anyone acting on behalf of Action Tungsram, a party with whom Amernational settled under seal, all travel itineraries of EEI and Action Tungsram, all passports and visas of EEI's officers, employees, representatives, servants, etc., records of EEI's payment of attorneys' fees, actual samples of light bulbs, and so forth, none of which had any bearing on Amernational's burden of proof, and in no way affected its ability to sustain that

burden, which explained why it did nothing to pursue the document demand for over two years. Nonetheless, EEI did produce as much documentation as available, both informally, and under a formal Rule 34 response as well.

Although Amernational argues that EEI did not "appeal" the default judgment, EEI did move pursuant to FRCP Rules 55(c) and 60(b) to vacate the default judgment, which is a fully acceptable procedure. In a quite detailed and well reasoned analysis, the Sixth Circuit, by unanimous opinion, properly reversed the lower Court, finding that the District Court "clearly abused its discretion in denying Electro (i.e., EEI) relief from the default judgment" (Appendix "A", page 16). Nothing Amernational has presented warrants any interference with that decision.

REASONS FOR DENYING THE WRIT

I. There are No Special or Important Reasons for Granting Review

Amernational argues that this case "presents the opportunity for the Court to provide judicial guidance on the application of Rule 60(b) relief as it applies to default judgments imposed as Rule 37(b) discovery sanctions." We respectfully maintain that such guidance is unnecessary, as the law in this area is quite explicit and in full conformity.

Amernational seeks to carve out a distinction between default judgments entered for non-appearance, as opposed to those granted as a discovery sanction. Notwithstanding the underlying reason, a default judgment remains what it purports to be, a final judgment effectively adjudicating the merits unless set aside. Indeed, Amernational's default judgment entered by the District Court (Appendix "L") makes no such distinction, and does *not* specify that it is merely a "discovery sanction."

The Sixth Circuit specifically dealt with Amernational's argument that a "distinction" should be made, stating in clear and convincing terms:

> "Plaintiff argues that [t]he trial court's decision whether or not to set aside a default judgment entered as a sanction is governed by different considerations than those applicable to a default judgment entered for a defendant's non-appearance." Appellee's Brief at 14. *Not only does plaintiff fail to offer any authority to support its argument, but plaintiff also fails to explain how a belated response to a discovery request is a more egregious action than a belated pleading*—a context in which we have specifically applied the three-factor analysis set forth in *United Coin.* See *INVST Fin. Group v. Chem-Nuclear Systems,* 815 F.2d 391, 398 (6th Cir.), *cert denied,* 484 U.S. 927, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987). Moreover, other courts have granted relief under Rule 60(b) from judgment entered as a discovery sanction. See *Kotlicky v. United States Fidelity & Guar. Co.,* 817 F.2d 6, 9 (2d Cir. 1987) (balancing policy of finality against policy favoring determination on the merits); *United States Artists Corp. v. Freeman,* 605 F.2d 854, 857 (5th Cir. 1979) (per curiam) (refusal to cooperate was due to confusion and ignorance); see also *United States v. Shipco General Inc.,* 814 F.2d 1011, 1013 (5th Cir. 1987) (refusing relief by applying factors similar to those in *United Coin).* Accordingly, we hold that the *United Coin* analysis applies to this case."
>
> (Appendix A, pages 11-12, emphasis supplied)

Not taking any well-needed enlightenment from the Sixth Circuit, Amernational repeats the same argument to

this Court, but likewise, fails to present any authority whatsoever for its position.

Jurisdiction to review appellate decrees by certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or to secure uniformity of decision. *Forsyth v. Hammond,* 166 U.S. 506, 41 L.Ed. 1095 (1897); *Fields v. United States,* 205 U.S. 292, 27 S.Ct. 543, 51 L.Ed. 807 (1907); *Warner v. New Orleans,* 167 U.S. 467, 17 S.Ct. 892, 42 L.Ed. 239 (1897); *Magnum Import Co. v. Coty,* 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

Certiorari will not be granted except in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery Inc.,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955); *Fields v. United States, supra; N.L.R.B. v. Pittsburgh SS Co.,* 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).

Distinguishing between a default judgment entered for non-appearance and one entered as a discovery sanction is not an issue of substantial importance to the public. In fact, it was not even important to Amernational since, as stated, its own default judgment which it prepared does not indicate the reason why it was being issued, the reason obviously being irrelevant to the force and effect of the default judgment.

Amernational has not evidenced how the effect of default judgments differs in any way, or why they should be treated differently, depending on the reason for entry. Under Rule 55(a), an entry of default can be made for failure to plead or defend, or for failure to comply with Court orders. *Eisler v. Stritzler,* 535 F.2d 148 (1st Cir. 1976).

Amernational asks whether the standard for relief under Rule 60(b) to set aside a default judgment imposed under Rule 37, is the same as the standard when the default judgment was entered for non-appearance. That question has already been answered uniformly by the Circuits.

The default judgment entered against EEI, for whatever reason, was a final judgment adjudicating the action, and was viewed as such by Amernational, which moved for execution against assets of EEI, an agency or instrumentality of a foreign sovereign state, just as if Amernational had obtained a judgment after trial (Appendix "N" to petition).

Rule 60's requirements are explicitly set forth in subsections (a) and (b), and the standards are more stringent than an application under Rule 55(c). *Chrysler Credit Corp. v. Macino,* 710 F.2d 363 (7th Cir. 1983).

If the Congress felt that a distinction should be made because of the reasons for which a default judgment can be entered, it would have so stated in the Federal Rules. Rule 60 is applicable when moving to set aside *any* judgment, including a default judgment, whether granted for non-appearance, failure to defend, or as a discovery sanction.

Amernational wishes to re-write Rule 60 to suit its own private purposes. The Rule, however, is quite clear, and no alternative interpretations can be written into it.

The Sixth Circuit explained the criteria under Rule 60 to set aside a judgment by default, mainly, lack of prejudice to plaintiff, existence of a meritorious defense, and absence of willfulness of defendant which led to default (Appendix A, page 11). The Court, then, carefully examined each of those factors with a view toward determining whether the District Court properly exercised or abused its discretion.

Amernational argues that a consideration of defenses is irrelevant on a Rule 60 motion, and, once again, flies squarely in the face of established law. To justify a vacature of the default judgment under Rule 60(b), the movant *must* make a showing that he has a meritorious defense to the action. *Gomes v. Williams,* 420 F.2d 1364, 13 F.R. Serv. 2d. 1226 (10th Cir. 1970); *Central Operating Co. v. Utility Workers of America,* 491 F.2d 245 (4th Cir. 1974). Indeed, a meritorious defense is a "necessary predicate to the reversal of a denial of a Rule 60(b) motion." *Ralston Purina Corp. v. Navieras De Canarias S.A.,* 619 F.2d 152, 153, 29 F.R. Serv. 2d 714 (1st Cir. 1980).

Thus, Amernational's second "question presented," whether the merits may be reviewed on a Rule 60(b) motion, has also been adequately considered and answered already. The merits *must* be reviewed. The Sixth Circuit, in this case, held:

> ". . . we find absolutely no merit in plaintiff's position that the merits cannot be considered, and we are surprised that this argument prevailed in the District Court." (Appendix A, page 13).

Not surprisingly, Amernational presented no authority to the Sixth Circuit, and offers no authority to this Court either, for its argument.

II. The Only "Confusion" is Not Among the Circuits, But in Amernational's Way of Thinking

Certiorari is granted in cases where there is a *real and embarrassing conflict* of authority and opinion between the Courts of Appeals. *NLRB v. Pittsburgh S.S. Co., supra; Rice v. Sioux City Memorial Park Cemetery Inc., supra.*

The factors summarized by the Sixth Circuit have been uniformly followed by the other Circuits in reviewing whether an abuse of discretion occurred. See, for example, the Tenth Circuit in *Gomes v. Williams, supra,* the 4th Circuit in *Central Operating Co. v. Utility Workers of America, supra,* the 2nd Circuit in *Davis v. Musler,* 713 F.2d 907, 36 F.R. Serv. 2d, 1370 (2d Cir. 1983); the 3rd Circuit in *Diversified Utilities Sales Inc. v. Monte Fusco Excavating Contract Co., Inc.,* 71 F.R.D. 661 (E.D.Pa. 1976), and *Reid v. Liberty Consumer Discount Co.,* 484 F.Supp. 435, 28 F.R. Serv. 2d 1318 (E.D.Pa. 1980), and so on.

Amernational, on pages 16 and 17 of its petition, argues that the Third Circuit used a six-part test, as opposed to the Sixth Circuit's three-part test for review. Those six parts, as set forth in *Poulis v. State Farm Fire & Casualty Company,* 747 F.2d 863 (3rd Cir. 1984), obviously equate to the three part standard, and are merely an expansion upon themselves, those criteria being, 1) the party's personal responsibility; 2) prejudice to the adversary; 3) history of dilatory conduct; 4) willfulness or bad faith; 5) effectiveness of lesser sanctions; 6) meritorious claim or defense (747 F.2d at 868). There is absolutely no confusion or conflict whatsoever between the Sixth Circuit's test of prejudice, meritorious defense, and party's culpability, and the test in *Poulis.*

United Artists Corp. v. La Cage Aux Folles Inc., 771 F.2d 1265 (9th Cir. 1985), relied on by Amernational, is not in conflict with any Circuit, and deals with an appeal of a Rule 37 dismissal of the complaint. In fact, that Court did not even consider the Rule 60(b) motion (771 F.2d at 1271).

Likewise, *C.K.S. Engineers Inc. v. White Mountain Gypsum Co.,* 726 F.2d 1202 (7th Cir. 1984), cited by Amernational, conforms to uniform precedent. Refusing to carve

out distinctions, the Court, there, stated that a "decision on a Rule 60(b) motion is subject to the *same* abuse of discretion standard of review in the default judgment context as in any other context." (726 F.2d at 1205, citing, *Inryco Inc. v. Metropolitan Engineering Co.*, 708 F.2d 1225 (7th Cir. 1983)). That Court also pointed to the necessity of a meritorious defense on a Rule 60(b) motion, together with the even more essential factor of a legitimate excuse for the default (at 1208). Thus, *C.K.S. Engineers* is in complete conformity with the analysis of the Sixth Circuit in this case.

Again, Amernational's citation of *Securities and Exchange Commission v. Seaboard Corp.*, 666 F.2d 414 (9th Cir. 1982), follows the established law, rather than presenting a conflict, and holds that review of the merits is required, together with a showing of excusable neglect (at 416).

In fact, the cases cited by Amernational do not represent any conflict imaginable. Each is based on quite different fact patterns. Each generally holds that one factor alone is insufficient when considering a lower Court decision within the scope of appellate review. All the Circuits, however, agree as to what those factors are. The emphasis is determined by the particular facts of the case and the subsection of Rule 60 under which a party is moving.

Simply because the defaulting party has a meritorious defense, that, alone, would not get him "off the hook," as Amernational artfully phrased it on page 20 of its petition. The movant under Rule 60(b) still has to meet the other criteria as uniformly established in every Circuit.

Amernational wishes to reverse the entire body of law in this area, and, indeed, turn Rule 60 on its head. Amernational has not demonstrated any confusion or conflict

among the Circuits in this matter, but, instead, offers its own theories and speculation as to what the law "should" be, absent the slightest authority or support. Amernational is merely unhappy with the Sixth Circuit's decision vacating the default judgment, and tries to create a fanciful and incredible scenario of supposed conflict where, in reality, none exists, to try to persuade this Court to grant the petition.

Amernational, on page 19, even misstates Rule 37(b), by asserting that the procedure for imposing default judgments as sanctions involves, merely, issuance of an order and failure to obey the order. In fact, it involves much more than that simple pattern. Amernational conveniently omitted the essential requirement necessary to impose the drastic sanction of last resort, mainly, willful, bad faith conduct. *Kozlowski v. Sears, Roebuck & Co.*, 71 F.R.D. 594, 21 F.R. Serv. 2d 1372, motion denied, 73 F.R.D. 73, 22 F.R. Serv. 2d 1008 (D.C.Mass. 1976); *Sieck v. Russo*, 869 F.2d 131, 13 F.R. Serv 3d 67 (2d Cir. 1989). Just as Amernational has misinterpreted Rule 37(b), that same mistaken view permeates Amernational's discussion of Rule 60(b).

The criteria for setting aside default judgments under Rule 60(b), and the scope of review of such decisions, are uniformly applied throughout the Circuits. The fears raised by Amernational are illusory and of its own making. The order of the Sixth Circuit poses no conceivable threat whatsoever to the control of discovery by the District Courts. On the contrary, it corrected an abuse of discretion, which is exactly the function of appellate review. The order was proper in all respects, and no genuine basis to grant the petition has been presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
May 28, 1991

Respectfully submitted,

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No. 90-1770

In The

Supreme Court of the United States

October Term, 1990

AMERNATIONAL INDUSTRIES, INC.,

Petitioner,

v.

ELECTROEXPORTIMPORT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The petition for certiorari in this case presents two issues to the Court: 1) whether the standard for granting relief under Rule 60(b) to set aside a default judgment imposed as a discovery sanction under Rule 37, is the same as the standard for setting aside a default judgment entered for non-answer or non-appearance, and 2) whether the underlying merits may be reviewed on the appeal of the denial of a Rule 60(b) motion to set aside a default judgment, where there is no appeal from the entry of the default judgment.

The relevant underlying facts of the case are procedural. The plaintiff, Amernational, served a request for production of documents on defendant, Electroexportimport (Electro) on December 12, 1986. By August 2, 1989, the date the district court entered a default judgment against Electro at a hearing to show cause, the request had still not been complied with. During this lengthy interval, Electro had been subjected to three motions for default, the first, for failure to file an appearance and failure to appear at two pre-trial conferences, the second, for failure to pay the sanctions previously ordered by the court and failure to respond to discovery requests and the third, for failure to respond to discovery requests.

Electro missed the deadline for timely appeal of the default judgment. The district court later denied Electro's Rule 60(b) motion to set aside the judgment. The Court of Appeals for the Sixth Circuit reversed the denial of the Rule 60(b) motion, citing abuse of discretion.

REASONS FOR ALLOWANCE OF THE WRIT

I.

IMPORTANCE TO THE FEDERAL COURT SYSTEM

Petitioner urges that there should be a separate, distinct and narrower standard for granting relief from default judgments imposed as discovery sanctions than for default judgments imposed for non-appearance. Such a narrower standard will further the policy to deter discovery abuse expressed by this Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). The implications of the issues raised in the petition go far beyond the dispute of the parties in the present case: this deterrence policy has obvious and substantial importance to every case tried in the federal court system.

II.

NO COHERENT STANDARD EXISTS AMONG THE CIRCUIT COURTS FOR GRANTING RELIEF FROM DEFAULT JUDGMENTS IMPOSED AS DISCOVERY SANCTIONS

In describing the standard for granting relief from default judgments imposed as discovery sanctions, Electro states that "the law in this area is quite specific," (Brief in Opposition, p. 5) and that Amernational's argument "flies squarely in face of established law." (Brief in Opposition, p. 9) Electro, however, does not offer any cases on point to illustrate this "established law." Every case that Electro cites in purporting to establish an "entire body of law in the area" involves a Rule 60 motion for a default judgment imposed for failure to answer, or for

failure to appear, plead, or otherwise defend. Electro does not cite any cases dealing with the standard of review for motions to set aside default judgments imposed as discovery sanctions.

Amernational has highlighted the many different and conflicting approaches taken by the federal circuits in handling Rule 60(b) motions for relief from default judgments issued as discovery sanctions.

A. Sixth Circuit

In the present case, the Sixth Circuit, in reviewing the district court's exercise of discretion in its denial of a Rule 60(b) motion, applied the same analysis to a discovery default as used for a non-appearance default. The Sixth Circuit made its own findings of fact in applying a three-part test: 1) whether the plaintiff will be prejudiced; 2) whether the defendant has a meritorious defense; and 3) whether culpable conduct of the defendant led to the default. The Sixth Circuit then ruled that Electro had shown "excusable neglect" under 60(b)(1) and "other reason[s] justifying relief" under 60(b)(6). The Sixth Circuit also addressed the merits of the underlying claims and defenses to further buttress its decision.

B. Second Circuit

In *Kotlicky v. United States Fidelity & Guar. Co.*, 817 F.2d 6, 8 (2nd Cir. 1987) the Second Circuit stated that relief under Rule 60(b) from a default judgment imposed as a discovery sanction is limited to one of the six grounds specified in the rule. 817 F.2d at 8-9. The Second

Circuit did not substitute its own discretion for that of the district court, and there was no review of the underlying merits of the dispute. The *Kotlicky* court further held that appellate review was limited to whether the trial court abused its discretion.

C. Third Circuit

In *Poulis v. State Farm and Casualty Company*, 747 F.2d 863, 898 (3d Cir. 1984) the Third Circuit used a six-part test for granting relief from a default judgment or dismissal imposed as a discovery sanction: 1) the extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; 3) a history of dilatoriness; 4) whether the conduct of the party or the attorney was willful or in bad faith; 5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and 6) the meritoriousness of the claim or defense.

D. Fifth Circuit

In *Phillips v. Insurance Co. of North America*, 633 F.2d 1165, 1167 (5th Cir. 1981) the Fifth Circuit limited its review of the denial of Rule 60(b) motions to whether the district court abused its discretion. The *Phillips* court did not state what criteria the district court should apply in such cases, but considered and dismissed the appellant's arguments that its actions were in "good faith" and that it did not intentionally disregard the discovery order. The court noted that the merits of the case can not be

appealed by appealing denial of the 60(b) motion. Specifically, the court stated that "appellate review of the denial of such a motion 'must be narrower in scope than review of the underlying order of dismissal so as not to vitiate the requirement of a timely appeal.'" 633 F.2d at 1167 (quoting *Silas v. Sears, Roebuck & Co., Inc.*, 586 F.2d 382, 386 (5th Cir. 1978)).

E. Seventh Circuit

In *Ben Sager Chemicals Int'l, Inc., v. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977) a case involving attorney misconduct and a default judgment entered as a discovery sanction, the Seventh Circuit held:

> In order to qualify for Rule 60(b)(1) relief, the "movant must demonstrate that he has a meritorious defense *and* that arguably one of the four conditions for relief applies – mistake, inadvertence, surprise or excusable neglect."

Ben Sager, 560 F.2d at 809 (quoting *Universal Film Exchanges, Inc. v. Lust*, 479 F.2d 573, 576 (4th Cir. 1973), emphasis original).

In *C.K.S. Engineers Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984), the Seventh Circuit considered the following factors: 1) "Rule 60(b) relief is applied liberally in the default judgment context only in the exceptional circumstance where the events contributing to the default judgment have not been within the meaningful control of the defaulting party, or its attorney" 726 F.2d at 1206; 2) "the district court must have the default judgment readily available within its 'arsenal of sanctions' in order to ensure that litigants who are vigorously

pursuing their cases are not hindered by those who are not" 726 F.2d at 1206; 3) Rule 60(b) relief must be perceived as an extraordinary remedy "[i]n order for the default judgment to be an effective deterrent against irresponsible conduct in litigation" 726 F.2d at 1206; 4) Rule 55(c) is another remedy available to the defaulting party 726 F.2d at 1206; and 5) the policy of the 7th Circuit that "defaults should be entered only when absolutely necessary, such as where less drastic sanctions have proven unavailing." 726 F.2d at 1206.

The Seventh Circuit in *Inryco, Inc. v. Metro. Eng'g Co., Inc.*, 708 F.2d 1225 (7th Cir. 1983) used an abuse of discretion standard in reviewing a Rule 60(b) motion for relief from a default sanction. The court held that "[t]he decision on a Rule 60(b) motion is left to the broad discretion of the district court" (708 F.2d at 1230) and that "default judgments should generally be set aside where the moving party acts with reasonable promptness, alleges a meritorious defense to the action, and where the default has not been willful" (708 F.2d 1230, citing *A.F. Dormeyer Co., v. M.J. Sales & Distributing Co.*, 461 F.2d 40, 43 (7th Cir. 1972). Finally, the court noted that Rule 60(b) is "reserved for extraordinary relief" and that "a litigant therefore must show exceptional circumstances to justify overturning the default judgment." 708 F.2d at 1230.

Finally, in *United States v. DiMucci*, 879 F.2d 1488 (7th Cir. 1989) the Seventh Circuit stated that the test under Rule 60(b) to vacate a default judgment entered as a discovery sanction required defendants to show: 1) good cause for their default; 2) quick action to correct it; and 3) a meritorious defense to the plaintiff's complaint. 879 F.2d at 1495.

The *DiMucci* court found that a delay of 10 months by the defaulting party constituted prejudicial delay which "seriously hampered [plaintiff's] trial preparations." 879 F.2d at 1494 (citing *Hindmon v. National-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 621 (7th Cir. 1982). This statement conflicts with the Sixth Circuit's holding in the present case that "delay alone is not a sufficient basis for establishing prejudice." (quoting *Davis v. Musler*, 713 F.2d 907, 916 (2nd Cir. 1983). Meritorious defenses were not considered by the Seventh Circuit in *DiMucci* because no "good cause" was shown for the default.

F. Ninth Circuit

United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265 (9th Cir. 1985) addressed a situation where a party appealed from both a Rule 37(b) dismissal and a denial of a Rule 60(b) motion. The Ninth Circuit considered several factors in reviewing Rule 37 dismissal sanctions. First, the district court must have considered lesser sanctions before granting a dismissal sanction. Second, the Rule 37 dismissal sanction was appropriate "only where the failure to comply is due to willfulness, bad faith, or fault of the party." 771 F.2d 1270 (quoting *Wyle v. R.J. Reynolds Ind., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983). Finally, in reviewing dismissal sanctions, the Ninth Circuit used an abuse of discretion test, requiring a "definite and firm conviction that a clear error of judgment was made by the court below" for reversal. 771 F.2d at 1270.

The Ninth Circuit, in *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381 (9th Cir. 1988), considered an appeal from a Rule 37(b) dismissal sanction and denial of a Rule 60(b)

motion. The court of appeals listed five factors that a district court must consider before imposing the dismissal sanction: "1) the public's interest in expeditious resolution of litigation; 2) the court's need to manage its docket; 3) the risk of prejudice to the defendants; 4) the public policy favoring disposition of cases on their merits; and 5) the availability of less drastic sanctions." 862 F.2d at 1385.

This confusion, evidenced in both the wide spectrum of approaches in reviewing Rule 60(b) motions involving default judgments imposed as discovery sanctions in the courts below – as well as in opposing counsel's brief, is a strong indication of the necessity for this Court to review the issues raised in this petition.

III.

THE UNDERLYING MERITS OF THE DEFENDANT'S CASE MAY NOT BE REVIEWED ON APPEAL OF A RULE 60(b) MOTION WHERE THERE IS NO APPEAL FROM THE ENTRY OF THE DEFAULT JUDGMENT.

Electro argues that, on appeal of a Rule 60 motion to vacate a default judgment where no appeal has been taken on the default judgment, the merits of the defaulting party's case must be reviewed. (Brief in Opposition, p. 9) This argument is directly contrary to the settled law. Where no appeal has been taken from a judgment, but instead appeal is taken only from denial of a Rule 60(b) motion, the scope of review is limited to whether the lower court abused its discretion in ruling on the motion. *Browder v. Director, Dep't of Corrections of Illinois*, 54 L.Ed.2d 521, at 530 n.7 (1978). The merits are not considered.

CONCLUSION

It is requested that this Court review this case to preserve the control of the district courts over the discovery process.

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, in the alternative, summary reversal of the decision of the Court of Appeals should be ordered.

Respectfully submitted,

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